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REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

The right to freedom of opinion and expression

Current problems of its realization and measures necessary for its strengthening and promotion

Preliminary report prepared by Mr. Danilo Türk and
Mr. Louis Joinet, Special Rapporteurs

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INTRODUCTION

1. This report is part of the project submitted by Mr. Danilo Türk in working paper E/CN.4/Sub.2/1989/26 prepared in accordance with decision 1988/110 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. It follows on from the working paper concerning the detention of persons who exercise the right to freedom of opinion and expression prepared by Mr. Louis Joinet. 1/

2. In accordance with the recommendations made by Mr. Türk in paragraphs 63 and 64 of his working paper, it constitutes a preliminary report on "The right to freedom of opinion and expression: current problems of its realization and measures necessary for its strengthening and promotion"; it is primarily concerned with the problems of the limitations and restrictions which may "regulate" this right and with the measures to be taken to promote and strengthen its effective exercise.

3. In the present report, the two Special Rapporteurs responsible for preparing the study on the right to freedom of opinion and expression (Sub-Commission resolution 1987/14) have further developed the scope of their remarks. In Chapter I, taking as a reference articles 19 and 20 of the International Covenant on Civil and Political Rights, they analyse the interpretations given to the legal régime governing the right to freedom of opinion and expression both at the international level, basing themselves on the pertinent provisions of the instruments concerned, and at the domestic level, with a rapid evaluation of the normative differences. The first point necessarily takes into account the rights of the individual with which the right in question could interfere (freedom of assembly, association, movement, etc.).

4. In Chapter II, the Rapporteurs consider the changes in legislation currently being made in various countries which have started on a process of democratization, with a view to examining whether there can be, in this field, an acceptable consensus that ought to be encouraged, and whether certain deviations from the concept of a "democratic society" should not be discouraged or contained.

5. Finally, in Chapter III, the Rapporteurs examine the main types of restriction to which the right to freedom of opinion and expression is subject and seek to establish a threshold of compatibility of these restrictions with the norms and criteria previously highlighted. The Rapporteurs have been particularly interested in those restrictions which, *a priori*, could be admissible provided that certain guarantees are respected.

6. Apparently, for example, summary executions, torture and enforced disappearances invariably constitute inadmissible violations of the rights of the person which no circumstance could justify. The fact that they occur in connection with freedom of expression does not appear, *a priori*, to give them any distinctive specific value and they are already taken into account in other arrangements for protection, including the work of special rapporteurs. Nevertheless, these issues should not be underestimated as far as freedom of expression and information are concerned, since a large number of applications submitted to the Human Rights Committee relate to joint violations of article 7 (prohibition of torture) and article 19 (freedom of expression) of the International Covenant on Civil and Political Rights.

7. Thus, it would be necessary to determine how the work on these points could be distributed among the special rapporteurs and the authors of the present report and how far they should co-operate in this field. From another point of view, out of concern to delimit clearly the scope of the study in order to make it more effective, the Rapporteurs will give their main attention to measures which affect the individual directly when he wishes to exercise his right to freedom of expression and they will discuss the negative obligations which States have not to derogate from the very substance of this right.

8. As far as the positive obligations to take all necessary measures to secure the effectiveness of the right are concerned, it is proposed, at least initially, to leave aside "indirect" violations of the right to freedom of expression. The concept of indirect violations may be defined in terms of article 13, paragraph 3, of the American Convention on Human Rights, which is the only instrument to deal with them explicitly by providing that "The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information". This aspect, very important for the effectiveness of the right to freedom of expression, ought to be considered separately; otherwise the text would depart too far from the mandate to secure, in the first place, the protection of the individual in his elementary freedoms.

9. The positive obligations which States must assume in order to avoid indirect violations such as concentrations of the press amounting to semi-monopolies, the granting of tax benefits to enterprises in financial straits or the assignment of subsidies and frequencies, which fall within the broader concept of the right to communication, should be dealt with in a specific study on the limitations imposed in the form of prior authorizations like those provided for in article 10 of the European Convention on Human Rights. These matters will, however, be taken up in so far as they are of interest for the development of the concept of a democratic society (see, in chap. III, sects. C.3, paras. 150-170). On the other hand, the question as to the positive obligations which the State must assume when faced with certain machinations involving direct violations by members of civil society remains unanswered.

10. As far as methodology, particularly sources of information, is concerned, it has not been possible, at this stage, to make a complete analysis of all the relevant sources of information. Accordingly, account has been mainly taken of the documents available, namely:

(a) The documentation originating in the pertinent organs of the United Nations, particularly in the Human Rights Committee, made available to the Rapporteurs by the Centre for Human Rights;

(b) The documents of the Council of Europe, particularly the decisions of the European Court of Human Rights;

(c) The comments and work of non-governmental organizations, especially Amnesty International, Article 19, and Reporters sans Frontières. Account should also be taken of the information on the inter-American and African regional organizations for the protection of human rights, but the replies to the requests for documentation sent to them have not yet reached the Rapporteurs.

CHAPTER I

PROPOSALS FOR AN INTERPRETATION OF THE LEGAL REGIME GOVERNING THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION

A. At the international level

11. The analysis of the framework established by articles 19 and 20 of the International Covenant on Civil and Political Rights was initiated in Mr. Türk's working paper (E/CN.4/Sub.2/1989/26). The intention here is to take into account, from the standpoint of that initial approach, the provisions of the other pertinent international instruments for the purpose of clarifying a few points.

1. Elements of the content of the right to freedom of opinion and expression

12. It is true that, in comparison with the provisions of regional instruments on freedom of opinion, expression and information, the wording of article 19 of the Covenant shows a certain originality:

> "1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart _information_ and _ideas_ of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (_ordre public_), or of public health or morals."

13. The article seems to introduce a difference between the protection of freedom of opinion and the protection of freedom of expression, since the first appears to enjoy absolute protection, and the second only relative guarantees. In order to verify the pertinence of this hypothesis, an attempt will be made to define freedom of opinion by contrasting it with other components of freedom of expression and to see whether this definition justifies special treatment.

(a) Opinion; expression; information; idea

(i) International instruments adopted by the United Nations

14. In the first place, article 19 of the Covenant must be compared with the pertinent provisions of other instruments for the protection of human rights adopted by the United Nations.

The International Convention on the Elimination of All Forms of Racial Discrimination

15. This Convention provides that States Parties undertake to prohibit and eliminate racial discrimination in all its forms, including in matters relating to the enjoyment of the right to freedom of opinion and expression (art. 5, (d) (viii). Here the two concepts, opinion and expression, are simply separated.

The International Convention on the Suppression and Punishment of the Crime of Apartheid

16. This Convention stipulates that the crime of *apartheid* includes "Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country (...), in particular by denying to members of a racial group or groups basic human rights and freedoms, including (...) the right to freedom of opinion and expression ...". Here the concepts of freedom of opinion and freedom of expression are also envisaged separately, if not independently.

The Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which they Live 2/

17. Article 5 of this Declaration stresses the separate nature of the concepts of opinion and expression. It inserts freedom of opinion between freedom of conscience and freedom of religion in order, so it seems, better to circumscribe the power to authorize the restrictions prescribed by law and necessary for some reason of general interest. This does not clarify the relationship between the two concepts.

18. In fact, article 5, paragraph 1 (e), guarantees "The right to freedom of thought, opinion, conscience and religion; the right to manifest their religion or beliefs subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others".

19. On the other hand, paragraph 2 (b) of the same article states that "Subject to such restrictions as are prescribed by law and which are necessary in a democratic society to protect national security, public safety, public order, public health or morals or the rights and freedoms of others, and which are consistent with the other rights recognized in the relevant international instruments and those set forth in this Declaration, aliens shall enjoy the following rights: (a) ...; (b) The right to freedom of expression ...". This instrument therefore distinctly separates the two concepts, although the reason for doing so is not clear; unlike the Covenant, it provides that the right to freedom of opinion may, in the case of aliens, be subject to restrictions.

20. These remarks confirm Mr. Türk's initial analysis, according to which it is very difficult to give a precise content to the concept of freedom of opinion, and freedom of opinion cannot be given absolute protection.

(ii) Regional instruments

21. Regional instruments do not distinguish as clearly as does the Covenant between freedom of expression and freedom of opinion; neither do they offer increased protection for the latter.

The American Convention on Human Rights

22. In article 13, this Convention guarantees "freedom of thought and expression" as a single right which would include, in the words of paragraph 1, "freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers". However, the word "opinion" occurs again in paragraph 3 in connection with the prohibition of indirect restrictions, including "any ... means tending to impede the communication and circulation of ideas and opinions".

The African Charter on Human and Peoples' Rights

23. This regional instrument provides, in article 9, paragraphs 1 and 2, for the right of every individual to receive information and for the right of every individual to express and disseminate his opinions within the law. Information is thus contrasted with opinion and enjoys an apparently greater protection. Freedom of expression, in this case, is freedom to express opinions.

The European Convention on Human Rights

24. Article 10 presents a clearly different structure from that of article 19 of the International Covenant on Civil and Political Rights. It provides that:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

25. *A priori*, freedom of opinion does not enjoy a guarantee different from that accompanying the other components of freedom of expression. It is only one aspect of that freedom. However, the case law of the European Court has made it possible to give these concepts greater precision. In its ruling in the Lingens case of 8 July 1986, the Court held that what was involved was not the right of the journalist concerned to impart information, but freedom of opinion and his right to communicate ideas. It went on to state that the restrictions authorized by article 10 (2) were nevertheless still applicable.

26. The Court was led to make this distinction because, by virtue of the scope of article 111 of the Austrian Penal Code, Mr. Lingens would not escape being convicted for defamation by establishing the truth of his statements. However, although this requirement is plausible for information concerning facts, the Court held that for value judgements the requirement was unattainable and ran counter to freedom of opinion itself, a fundamental component of the right guaranteed by article 10 of the Convention.

27. This illustration, which alleviates the duties and responsibilities of a journalist when he is merely transmitting an opinion and not information, may partly justify the fact that freedom of opinion is given a separate place in the Covenant. This means that the operation of the right of reply, which is also provided for in article 14 of the American Convention on Human Rights, should be sufficient to protect the rights of others, without permitting broader restrictions. The question still stands. No doubt it would be advisable to return to it in connection with limitations. The right of reply is also provided for in article 8 of the European Convention on Transfrontier Television adopted at Strasbourg on 5 May 1989.

28. In short, it would appear that opinion must be distinguished from belief and thought, since the latter relate to the individual and his conscience whereas the former, being concerned with human rights in relation to others, would be opposed to "idea" and to information. Information would be concerned with objective data, ideas with constructs of the mind and intellectual speculation, whereas opinion would mean "value judgements".

29. Finally, it must be pointed out that article 10 of the European Convention on Human Rights, unlike article 19 of the International Covenant on Civil and Political Rights, does not have in view the seeking out of information but only the freedom to receive and impart it; the case law of the Court is, moreover, ambiguous on this point. For example, it has refused to extend freedom to receive information to the right to seek out information. In its ruling in the Leander case of 26 March 1987 the Court held that article 10 does not accord an individual the right to have access to a register containing information on his own situation or oblige the Government to communicate such information to him. It seems, in fact, that the right to seek out information is covered implicitly by article 10 of the European Convention on Human Rights. 3/

30. Nevertheless, the Council of Europe has started to sketch out a recognition of the right of individuals to have access to information held by the public authorities through the Declaration on Freedom of Expression and Information adopted by the Committee of Ministers of the Council of Europe on 29 April 1982 and through Convention (No. 108) for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981, which recognizes, in article 8, that the person concerned is entitled to have access to such data.

(b) Ways of exercising the freedom protected

31. Article 19 of the International Covenant on Civil and Political Rights, like article 13 of the American Convention on Human Rights, is relatively precise as to ways of exercising freedom of expression, which are,

consequently, subject to protection. The two articles cover freedom of expression as exercised orally, in writing or in print, in the form of art, or through any other media of the individual's choice.

32. Although article 10 of the European Convention on Human Rights does not have in view any specific form of this freedom, the case law of the European Court has already had to be applied in many fields, including oral, written or printed statements or artistic expression. It is noteworthy that although the Convention refers to radio, television and the cinema, it does so only for the purpose of permitting licensing systems in these fields.

(c) Protection regardless of frontiers

33. Lastly, protection applies regardless of frontiers, whether under the Covenant, the European Convention or the American Convention. Mention should also be made at this juncture, as a useful reference, of the Treaty of Rome setting up the European Economic Community which guarantees the free movement of persons, goods and services, which the Court of Justice of the European Communities has been able to apply in connection with the protection regardless of frontiers of freedom of expression, as article 10 of the European Human Rights Convention has sometimes even been invoked before it (Bond van Adverteerders and others v. State of the Netherlands, 26 April 1988, 352/85).

34. This requirement concerns first and foremost the question of foreign journalists and correspondents of information agencies who must be free to collect and transmit the news to the organs for which they work. Account was taken of this concern in the Final Act of Helsinki whereby the participating States undertake to "enable journalists of the other participating States, whether permanently or temporarily accredited, to transmit completely, normally and rapidly by means recognized by the participating States to the information organs which they represent, the results of their professional activity, including tape recordings and undeveloped film, for the purpose of publication or of broadcasting on the radio or television".

35. Likewise, in the Council of Europe, the Declaration of the Committee of Ministers of 29 April 1982 reaffirms that this principle can apply equally to research and to the dissemination and receipt of information even if the emphasis is usually placed on the latter aspect. By virtue of this rule the jamming of broadcasts from abroad is prohibited in principle.

2. Permissible limitations

36. All of the above-mentioned instruments provide that the rights they guarantee can be subject to restrictions, either under a general clause or under the terms of each article. Such restrictions are meant to take effect in the context of the normal exercise of the right without affecting the actual substance.

37. Furthermore, derogations from protection of freedom of expression can be introduced by means of what may be termed national security clauses designed to apply in situations involving so-called exceptional circumstances or a state of emergency to enable a certain number of rights to be suspended or restricted, in certain conditions, and with certain guarantees designed to preserve the model of the rule of law. This is the case with article 4 of the

Covenant, article 15 of the European Convention and article 27 of the American Convention. No clause of this type has been provided for in the African Charter. It is clear, however, from the second part of the Charter relating to the duties of the individual, that every article which guarantees a right carries within it the seed of this power to derogate.

(a) Permissible restrictions

38. As noted in the above-mentioned working document (E/CN.4/Sub.2/1989/26), the problem of limitations on the right to freedom of expression requires very careful consideration. Article 19, paragraph 3, of the Covenant, and article 10, paragraph 2, of the European Convention, authorize restrictions of the right which they guarantee, as a consequence of "duties and responsibilities" under the European Convention and of "special duties and special responsibilities" under the Covenant. Article 13 of the American Convention on Human Rights refers solely to responsibilities. The African Charter simply stipulates, in article 9, that the right to express and disseminate opinions shall be exercised in the context of the laws and regulations, but does not spell this out expressly in the case of freedom of information. Chapter II of the Charter, which concerns the duties of the individual, does, however, contain several provisions authorizing restrictions in fairly broad terms.

(i) The principle of the legality of the restriction

39. Limitations which are not "prescribed by law" (article 10 of the European Convention), "provided by law" (article 19 of the Covenant) or "expressly established by law" (article 13 of the American Convention) and, (purely for information) article 9 of the African Charter relating to laws and regulations are not admissible.

40. The requirement that there must be a prior law is determined strictly. According to the European Court, the law must be clear, accessible, precise and foreseeable, without, however, being excessively rigid (The Sunday Times case, para. 49, 26 February 1979). Also, the word "law" is not to be understood in too formal a sense: under these provisions common law is in fact a law.

(ii) The principle of the legitimacy of restriction

41. Then, even when provided for by the law, a restriction is permissible only if it has in view one of the objects limitatively enumerated by the texts concerned. It is noteworthy that the wider a law is, the less its constitutive elements are defined, the more difficult it is to monitor respect for this second criterion which one could call "legitimacy", and the easier it is for a State to claim to have one of these objectives in view or to divert laws from the objective which they claim to pursue. From this point of view, the control of legitimacy is far from illusory; it is the natural extension of that of legality.

42. The Covenant, like the American Convention on Human Rights, is concerned with respect for the rights or the reputation of others, and protection of national security, public order, public health or morality.

43. The European Convention on Human Rights is more extensive in referring not only to national security and, somewhat redundantly, to territorial integrity or public safety and the prevention of disorder, but also to the prevention of crime. The protection of the reputation or rights of others is mentioned in the same terms. On the other hand, the Convention allows more numerous grounds for legitimacy when it authorizes restrictions "for preventing the disclosure of information received in confidence". One may think that public officials and members of the armed forces are concerned here, but there also arises the question of the protection of privacy, particularly concerning computerized files - and also "for maintaining the authority and impartiality of the judiciary". Finally, article 16 of the European Convention on Human Rights legitimizes restrictions on the political activity of aliens as follows: nothing in articles 10, 11 and 14 shall be regarded as "preventing the High Contracting Parties from imposing restrictions on the political activity of aliens".

44. The African Charter on Human and Peoples' Rights appears to offer less precise protection; while article 27 envisages the duties of the individual towards the family, security, the State, etc. and affirms that "the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest", apart from the fact that this concept of common interest is very wide, article 29 makes it a duty for the individual "to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society". It should be noted that there is a specific reference to criteria of "cultural values"; culture and its preservation do not in fact appear in any other instrument as a justification for restrictions. It needs to be clarified by the future practice of the African Commission. Finally, on the level of principles, the economic well-being of a country should never justify restricting the freedom of expression.

(iii) The principle of democratic necessity

45. Finally, there is a third criterion, found only in the European Convention on Human Rights: that of "democratic necessity". Even when provided for by the law, even when pursuing *a priori* one of the objectives laid down, a restriction cannot be permissible if it does not respond to a democratic necessity which is interpreted by the European Court principally as requiring respect for the principle of proportionality, but also respect for the democratic principles of the pre-eminence of the law and of the range of fundamental rights it protects. These last two criteria can also be linked to the restrictions imposed in article 20 of the Covenant and in article 13, paragraph 5 of the American Convention on Human Rights, which prohibit propaganda for war and any advocacy of national or racial hatred. Restrictions corresponding to these three criteria are valid, for they do not encroach upon the essential substance of the right.

(b) Permissible derogations

46. On the other hand, the "derogations", as distinct from "restrictions", which States are authorized to make in an emergency, provided, as we have seen, that certain conditions are respected which should make it possible in

principle to remain within the context of the State subject to the rule of law, encroach upon the essential substance of the right initially guaranteed.

47. Article 4 of the Covenant, article 15 of the European Convention and article 27 of the American Convention provide this "clause of national security". Only the African Charter contains no such clause, but, as indicated above, each article contains the seed of this power of derogation. It is noteworthy that the application of this clause reserves certain "inalienable" rights; this hard core is made up of the right to life, the prohibition of torture, slavery, and retroactivity of minimal law. Freedom of expression, however, which is at the centre of all the other rights, does not enjoy this protection.

48. Without reverting to the excellent report by Mrs. N. Questiaux (E/CN.4/Sub.2/1982/15), which adduced six principles of validity, let us simply re-group them round the three criteria identified above. Thus we have the criterion of legality, corresponding to the principle of proclamation, reinforced at the supranational level by the principle of notification; the criterion of legitimacy, characterized by the principle of exceptional threat; and the criterion of democratic necessity, with the principles of proportionality, non-discrimination and inalienability of certain fundamental rights. A seventh principle, having in view the provisional character of the measures, combines with legitimacy and democratic necessity. This analytical framework will enable us to understand more clearly, in chapter II below, the concept of "democratic society" from the viewpoint of freedom of expression.

(c) Permissible reservations

49. Finally, reference must be made to what is no longer strictly speaking a limitation of guaranteed rights, but a limitation of the commitments of States parties to these instruments through the interaction of reservations. In the event, the reservations relating to article 10 of the European Convention and article 19 of the Covenant, are essentially prompted by the wish to maintain monopolies; on the other hand, the reservations put forward in respect of article 20 of the Covenant seem to arise from a misreading or a misunderstanding of the necessary restrictions provided for in article 19.

50. According to the Secretary-General's Note on Reservations, Declarations, Notifications and Objections Relating to the International Covenant on Civil and Political Rights (CCPR/C/2/Rev.2), reservations to article 19 appear to have been entered by Australia, Austria, Belgium, France (subsequently withdrawn), India, Italy and Luxembourg in order to justify régimes of authorization or monopoly. Belgium, Denmark, Finland, Iceland, Luxembourg, the Netherlands, New Zealand, Sweden and the United Kingdom have put forward reservations to article 20, interpreting it either as unnecessary, or as limiting article 19 unduly. Austria, Belgium and France, on the other hand, quote articles 10, 11 and/or 16 of the European Convention on Human Rights as factors in their interpretation of article 19 of the Covenant.

B. At the domestic level

51. It appears - and the germ of the idea was present in the analysis of instruments already considered - that the only constitutional provision for the right to freedom of expression is insufficient to make respect for that right effective as such. A typology of States might be envisaged according to

whether the guarantee, however broad, that they give arises from the constitution or from the law. The rapporteurs mainly had at their disposal the latest reports of the Human Rights Committee on articles 19 and 20, the study by the non-governmental organization "Reporters sans Frontières" entitled Information dans le Monde, and publications by the non-governmental organization Article 19 on a number of countries. They also consulted the reports by Mr. Leandro Despouy, thus enabling the stage reached in the prevailing states of emergency to be noted (E/CN.4/Sub.2/1985/19; E/CN.4/Sub.2/1987/19/Rev.1 and Add.1 and Add.2; E/CN.4/Sub.2/1988/18, etc; E/CN.4/Sub.2/1989/30 and Add.1 and Add.2/Rev.1).

52. For the method of analysis it seems more effective and more realistic to follow the analytical framework already proposed, regarding the validity of limitations (restrictions and derogations). We shall therefore deal initially with the constitutional or legal definition of the content and constituent elements of protection, in order secondly to envisage the constitutional or legal account taken of permissible limitations and their legitimacy. Constitutional protection of a right has little value, if the constitution itself or special laws can deprive this protection of its substance and if no disposition can ensure the effectiveness of these guarantees, such as criminal or other penalties.

1. The constitutional and legal framework

53. Most countries offer constitutional protection for the freedom of expression, while some countries, possessing no written constitution or specific constitutional provisions, guarantee this freedom in a perfectly proper way. There are a few countries, such as Burkina Faso, Mauritania, New Zealand and the United Kingdom, that have no written constitution.

54. It is similarly rare for countries that do have a constitution not to offer such protection.

(a) These countries include the ones that neither guarantee this freedom at the constitutional level nor have a special law on information, for example: Brunei Darussalam, Guinea, Israel, the Lao People's Democratic Republic, Lesotho, Malawi, Mozambique, the United Kingdom, Viet Nam and Zimbabwe;

(b) Other countries, having neither a constitution nor guarantees provided in a constitution, have elaborated special laws. These include Burkina Faso, Czechoslovakia, Hong Kong, Malaysia, Namibia, New Zealand and Singapore. Similarly Mauritania, possessing only a Military Charter, has adopted a special law on the press;

(c) Among the countries with a written constitution expressly guaranteeing the right to freedom of expression in one or other of its aspects, one may further distinguish those that restrict themselves to stating a constitutional principle, whence the implementation of a single common right, from those which have adopted special laws on information. The break-down of the number of the countries is fairly similar in each of these categories: Cameroon, China (law in preparation), the Comoros, Côte d'Ivoiré, Ethiopia, Gabon, Gambia, Greece, Grenada, Guyana, India, Indonesia, Ireland, Jamaica, Japan, Luxembourg, Myanmar, the Netherlands, Norway, the Philippines, Rwanda, Seychelles, Sierra Leone, Spain, Sri Lanka, Sudan, Suriname, Sweden, Taiwan Province of China, the Union of Soviet Socialist Republics, the United Republic of Tanzania and Zambia.

(d) Some 40 countries, on the other hand, possess constitutional guarantees accompanied by special laws: Australia, Austria, Benin, Bulgaria (in preparation), Colombia, Costa Rica, Egypt, Ecuador, Finland, France, Germany, Federal Republic of, Honduras, Hungary, Iraq, Italy, Kenya, Kuwait, Mali, Mexico, the Niger, Nigeria, Panama, Paraguay, Peru, Poland, Portugal, the Republic of Korea, Romania, Senegal, the Syrian Arab Republic, Thailand, Togo, Trinidad and Tobago, Tunisia (press code in preparation), Turkey, United States of America, Uruguay, Venezuela, Yugoslavia and Zaire.

2. The degree of precision and extent of the guarantee

55. At this stage, it has not been possible to compare systematically the special laws in order to verify the extent of the protection which they offer. It is also difficult, for the time being, to establish a typology of the extent of constitutional guarantees.

56. It may be noted that some constitutions protect the right to freedom of expression very laconically. Others make no particular reference to freedom of opinion or to the press. For example, there is the preamble to the Constitution of the Central African Republic of 1986 and the Constitution of Mauritius, which protects the freedom of conscience and expression and the freedom to receive and disseminate ideas, without any reference to the press. Other Constitutions, like that of Rwanda, ensure, in addition to freedom of conscience, the freedom to express opinions, without any reference to information.

57. Some constitutions are more detailed, thus approximating to the formulation of international instruments. Besides freedom of expression, they refer to freedom of opinion (Ecuador, for example), and freedom of information. Thus, article 20 of the Constitution of Barbados specifies that freedom of expression includes freedom of opinion and the right to express one's opinions, freedom to receive ideas and information and to communicate ideas and information.

58. Finally, some atypical formulations are to be noted: freedom of expression and publication (Myanmar); freedom of speech and the press (Cuba); expression and dissemination of thought and speech in writing and through the press (Greece); expression and diffusion of opinion (Guatemala); free expression of opinion, *viva voce*, or in writing (Venezuela). In the circumstances, therefore, it seems premature to establish further similarities on the assumption that such an analysis would be truly useful for the present study.

59. The provisions which in several countries prohibit censorship seen to be more significant in respect of the extent of the constitutional guarantee (for example, article 49 of the Constitution of Afghanistan, article 17 of the Constitution of Czechoslovakia, the First Amendment to the Constitution of the United States, or the Austrian Constitution which prohibits censorship and concessions). Some underline the optimism of article 77 of the Constitution of Denmark, according to which censorship and other preventive measures shall never again be introduced into the Constitution.

60. Other prohibitions include: censorship and admonition, suspension and prohibition by administrative measures (Egypt); preliminary censorship (Guatemala; article 35); authorization procedure and censorship (Italy; article 21): There is also the Constitution of Liberia which, without referring to censorship, states that freedom of the press must never be "revoked, suspended or limited".

61. The concept of protection regardless of frontiers is confined to the international instruments in contrast to numerous constitutions which specify that protection is offered only to citizens. Thus, the Constitution of Benin reserves for citizens of Benin freedom of speech, the press, correspondence, assembly, association and demonstration; according to the Constitution of Venezuela, all citizens have the right to free expression of opinion, *viva voce* or in writing; the Constitution of India also specifies that the guarantee applies only to citizens.

62. Finally, it may be noted that, like the International Covenant on Civil and Political Rights and the American Convention on Human Rights, certain constitutions indicate the possible forms for the exercise of the freedom protected. These include the spoken word, the written word and the press (Greece); public, private, individual, collective, oral or written expression, or any other form of expression (Nicaragua); the spoken word, the printed word or pictures (Austria); the spoken word and the written word (Venezuela).

3. *Permissible limitations*

(a) *In the form of restrictions*

(i) *Provided for by the constitution*

63. Constitutions are not usually very precise about permissible restrictions: either they do not mention them, or they envisage them so broadly and imprecisely - often through a reference, which may or may not be explicit, to laws, which may or may not be special ones - that it is difficult to determine the scope of the right they profess to guarantee. The Colombian Constitution confines itself to affirming that the press is free but responsible, an affirmation which needs to refer to a criterion of legitimacy. The Danish Constitution provides that "any person shall be entitled to publish his thoughts in printing, in writing, and in speech, provided that he may be held answerable in a court of justice".

64. Some constitutions merely make a single reference to the laws of the State. Greece conditions its protection by a single reference to the observation of the laws of the State; Venezuela provides no other limits than those established by the law; in the People's Democratic Republic of Yemen, freedom of expression is guaranteed within the framework of the law; in Afghanistan freedom of expression is exercised in conformity with the provisions of the law; Taiwan Province of China has special laws, such as the one providing that newspapers must respect the law on national security, which prohibits in particular the encouragement of communism.

65. Thus, we infer that constitutions pay insufficient attention to the provision of permissible restrictions. Moreover, the legitimacy of restrictions, when specified, more often than not is indicated in a very ill-defined and broad manner.

66. One category of constitutions indicates the grounds authorized by the international instruments:

(a) Public order: Colombia (with its variants, such as social order and public peace), El Salvador, Iraq, Ireland, Rwanda and Senegal;

(b) Morality: Ireland;

(c) Morals: El Salavador, Islamic Republic of Iran and the Philippines (immoral doctrines);

(d) National security: Ireland (authority of the State), Nepal (attack on the unity of the realm) and Taiwan Province of China.

However, one finds no special references to the rights of others or to "contempt of court", in principle protected by special laws relating to libellous or slanderous denunciation, defamation and the protection of judicial authority.

67. A second category is based on a much wider and ill-defined legitimacy, apparently linked to the structure and nature of the State. Thus, a single party or a religion frequently appears as the only reference and sole instrument of legitimation. In this sense one finds the following kind of formulation: in Myanmar the constitutional guarantee is offered within the limits of what is not prejudicial to the interests of the workers and of socialism; Cuba recognizes freedom of speech and of the press "in conformity with the goals of socialist society"; in the Islamic Republic of Iran the guarantee is limited by "respect for religious beliefs"; in the Soviet Union this freedom must be exercised "in accordance with the interests of the people and in order to strengthen and develop the socialist system" (article 50 of the Constitution of 7 October 1977)

68. Finally, a third category refers to grounds for legitimacy which are obscure or difficult to interpret: social order (Colombia); "information in accordance with the facts" (Spain); "no one shall be prevented from enjoying freedom of conscience and religion except if he agrees thereto" (Gambia); "authority of the State" (Ireland); the freedoms are guaranteed "except for the punishment of offences committed on the occasion of their exercise" (Rwanda).

(ii) Prescribed by the law

69. In respect of the legal provision and the legitimation of restrictions by ordinary legislation, a distinction has already been made between countries which have a specific law on information and those which make do with their ordinary laws of common law (such as criminal indictment for defamation, slander or libel, pornography, protection of minors). It would doubtless have been useful to go into the detail of each one of these different laws in order to ascertain their clarity and precision, their accessibility and the extent to which provision can be made for them.

70. At this juncture it should simply be noted that many countries justify restrictions not clearly defined by excessively broad criteria of legitimacy, leaving the national authorities a dangerous margin of discretion *vis-à-vis*

the appraisal of freedoms. Thus, in the Democratic People's Republic of Yemen, Equatorial Guinea, Guinea, Haiti, Singapore and Somalia, the restrictions are ill-defined or undefined, and the decision ultimately falls to the authorities.

71. As well as being a source of uncertainty, it is dangerous to employ certain concepts to make certain forms of conduct an offence. Thus, blasphemy justifies restrictive laws in the same way as subversion or foul play. If recourse to the concept of false intelligence is disquieting, that of disinformation seems elusive, and recourse to the concept of false rumours is dangerous, as is incrimination for spreading rumours capable of undermining the unity of the realm. What precise meaning should one attribute to the use of this concept of rumour? Similarly, a simple reference to justification, without even a broad definition of the constituent elements of reprehensible behaviour, is too often made: thus, in the Netherlands information may, according to the law, be restricted in the interests of the efficient functioning of the State. In the Federal Republic of Germany, deliberate defamation, libel or slander of the Republic, of a Land or of the constitutional order justifies restrictions on the freedom of expression. In some countries, the interests of society warrant banning imports of publications which promote anti-socialist sentiments. In France, the mere fact that a publication is of foreign origin empowers the Minister of the Interior to prohibit and seize that publication, the perpetrators of the offence being liable to one year's imprisonment.

72. Finally, it is also necessary to analyse the existence, the functioning, the exact nature and role of the authorities responsible for information issues: the existence or non-existence of a Ministry of Information, an official censorship service, "ethics committee" and similar authorities.

(b) In the form of derogations

73. Last, and before concluding this first chapter, we must deal with derogations made under emergency laws. It is not our intention here to revert to the legality and legitimacy of states of emergency, already discussed by Mrs. Questiaux and Mr. Despouy in the reports mentioned above, but simply to point out rapidly the limitations which some countries have been able to impose under emergency legislation.

74. We recall first, as Mr. Despouy observed (E/CN.4/Sub.2/1987/19/Rev.1, para. 54), that article 19 of the Covenant is among the provisions most often mentioned (article 9, liberty and security; article 12, freedom of movement; article 17, protection of privacy; and article 21, right of peaceful assembly) as having formed the subject of derogations. Thus, of 29 countries listed on 18 December 1987, 12 have taken measures in derogation of the freedom of the press (E/CN.4/Sub.2/1987/19/Rev.1). For example, South Africa imposed limitations on press and audio-visual media coverage of certain events concerning in particular the behaviour of the police and conditions of detention, by fines, distraints and expulsions; the Minister may also prohibit publications for a period not exceeding three months. Certain measures of censorship, however, have recently been lifted. Further examples are: suspension in El Salvador and Ecuador (end of the emergency measures announced for 29 October 1987); censorship of the media and means of social communication undermining public order in Haiti (end of the state of emergency declared with effect from 14 December 1986), in Malaysia, Nicaragua (lifted

with effect from 8 February 1988), Panama (lifted with effect from 29 June 1987) and in Turkey. In Bangladesh and the Sudan, the suspension of freedom of expression was linked to the suspension of the Constitution (a provisional Constitution has been in force in the Sudan since 10 October 1985).

75. The question of these emergency measures calls for particular vigilance. It ought to be possible to ascertain very precisely whether they are purely and simply suspensions, or derogations broader than those authorized by article 19, paragraph 3 of the International Covenant on Civil and Political Rights. It would be advisable to know in detail what aspects have been limited or suspended, and under what specific justification, since the principle of proportionality (the strict measure required by the situation) must be determined in concrete fashion, derogation by derogation. 4/ It would also be necessary to know whether substitute guarantees had been given.

CHAPTER II

DEMOCRATIC PROCESSES AND THE ELABORATION OF THE CONCEPT OF A DEMOCRATIC SOCIETY

A. Changes in domestic practices

1. With regard to State structures

76. At present, the desire for democracy is increasingly common to all peoples. As an essential condition for an effective and respected democracy, freedom of expression is particularly affected by the changes taking place. It has been possible to observe *de facto* changes in restrictive practices made under the pressure of civil society, whether or not they are followed by *de jure* or official changes. In many countries, the changes in respect of freedom of expression are mainly due to a process of "emancipation" from the single party. Many measures have been taken, mostly on a provisional basis, in the expectation that political changes will be given tangible form by legislative measures.

77. These processes of liberalizing expression and information are taking different courses. In the first place, all provisions instituting a one-party system have been removed from many constitutions, with a direct impact on freedom of expression and information. At the same time, many media have been privatized or shareholdings in them have been taken out by private groups, sometimes of foreign origin. Next, and as part of the same movement, censorship has been abolished in many countries, as a result of which the ban on certain newspapers has been lifted and new press organs have been created. At the same time, persons imprisoned, sometimes over a very long period, for having exercised their right to freedom of expression are being released. Other countries are still only at the stage of promising to abolish censorship or, even more vaguely, to "respect freedom of expression without restriction".

78. On the other hand, in a number of countries problems are arising as a result of the pressure of certain circles which are, as it were, conferring the role of the single party upon religion. To prevent religion, under the cover of morality, from constituting a powerful brake on freedom of expression and on the emergence of an organized civil society seems to be another matter in respect of which vigilance will have to be exercised.

2. With regard to civil society

79. The role played by civil society in the changes taking place is far from negligible, whether it involves protests in the form of petitions, demonstrations or work stoppages to obtain the repeal of restrictive laws and the suppression of measures taken under or independently of them, the provision of guarantees or the release of journalists and other prisoners of opinion. Longer-term initiatives, such as the creation of press associations, may also be involved. Finally, mention should be made of an interesting example which is fairly untypical and which, from the standpoint of freedom of expression, poses complex questions of public international law. This is the attempt to charter a ship for the purpose of symbolically broadcasting to populations deprived of press pluralism in all its forms.

80. Another development is due to the abolition of states of emergency or of certain measures taken under states of emergency still in force. In the latter case, it is a question of determining what are the new circumstances that have made limitations on freedom of expression "superfluous". Here the example of South Africa is particularly interesting, since the removal of certain limitations had been linked with recognition of the African National Congress (ANC).

81. These different movements show that protection of freedom of expression is at the heart of any desire for democracy. New constitutions and new laws are being prepared, or are going to be prepared. These processes have, as a common characteristic, the emancipation of civil society from the State and from rulers, the abolition of censorship, the lifting of prohibitions, the release of prisoners of opinion, and the cancellation or reduction of penalties. These choices do not appear to be rationally governed by a clearly defined "democratic logic", and, despite the good intentions, the dangers of accidental deviation are great, especially where certain promises described as unrealistic are concerned. We shall nevertheless endeavour to isolate certain criteria that are both precise and sufficiently flexible and evolutionary to permit the protection of the "very substance" of the right to freedom of expression and information in a democratic society.

B. In search of criteria characterizing freedom of expression and information in a democratic process

82. This is particularly necessary because failure to respect freedom of expression leads, more often than not, to violations of other fundamental rights such as the rights to liberty, to security, to life, to protection against torture and to freedom of movement and also stems from violations of other fundamental rights such as freedom of movement, freedom of religion, freedom to demonstrate, and the right to privacy. The question then clearly arises as to the link between freedom of expression and the other rights guaranteed by international protective instruments. This point, far from being theoretical, is particularly important today in some countries engaged in the campaign against racism. How should the right of others to non-discrimination be combined with the right to freedom of expression so that the restrictions permissible in combating racism and, in certain circumstances, revisionism can be evaluated? It is noteworthy that the Covenant offers absolute protection for the first right, unlike the European Convention on Human Rights, which guarantees it not as such but only in the exercise of the other rights protected by the Convention.

83. A certain amount of over-abstract thinking about freedom of expression should not conceal the serious implications of the limitations that may be placed on this freedom. At the moment there seems to be a very great willingness to consider the search for some degree of transparency and pluralism as necessary, but it must be remembered that although democracy is indeed a pre-condition for the fulfilment of the individual and respect for him, a violation of freedom of expression primarily affects the individual himself and, in the longer term, pluralism.

84. According to the information collected, for example, by the non-governmental organization Reporters sans Frontières, in February 1990 alone 7 journalists were murdered, more often than not by uncontrolled

groups, 18 others were arrested and 6 were expelled for having expressed their opinion or for having disseminated information. In 1989, at least 53 journalists (73 according to Freedom House) were killed and 250 were arrested. By 30 January 1990, 12 journalists had already been killed and 35 arrested.

85. It is therefore understandable that the various applications submitted to the Human Rights Committee and to the regional bodies for the protection of human rights militate in favour of the elaboration of a universally acceptable concept of a democratic society applicable in matters of freedom of expression.

1. Pertinent documents of governmental and non-governmental international organizations

86. It will be useful to link up the decisions adopted by the Human Rights Committee and regional bodies for the protection of human rights with the work already done within the United Nations on this subject, particularly in Mrs. Daes's study on the individual's duties to the community and the limitations on human rights and freedoms under article 29 of the Universal Declaration of Human Rights (E/CN.4/Sub.2/432/Rev.2), the Universal Declaration of the Rights of Peoples, known as the "Algiers Declaration", and the Siracusa principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights (E/CN.4/1985/4).

(a) Mrs. Daes's study

87. Article 29 (2) of the Universal Declaration of Human Rights also refers to the concept of a "democratic society" in order to authorize restrictions on the rights and freedoms of the individual. Mrs. Daes's analysis of the *travaux préparatoires* makes it easier to grasp this concept, which can be made clearer by looking at the different variants which were proposed and then ruled out and the reasons for doing so. For the moment it will be considered that it is the rights of others that have essentially emerged as the legitimate limit and that the concept of the democratic State was rejected as being too narrow and rigid to be able to be applied universally without a danger of confusion.

88. Mr. Daes's study, which recapitulates and analyses in particular the three criteria of legality, legitimacy and democratic necessity, is directly concerned with freedom of expression. It can already be concluded that the study confirms the idea of an evolutionary and universally acceptable concept: thus Mrs. Daes referred to the three criteria put forward by J. Lively 5/ for evaluating a community's degree of democracy:

> "At least three basic criteria can be isolated by which the degree of democracy in any community may be tested: first, the extent to which all constituent groups are incorporated in the decision-making processes; secondly, the extent to which governmental decisions are subject to popular control; thirdly, the degree to which ordinary citizens are involved in public administration, the extent that is, of the experience of ruling and being ruled".

89. Mrs. Daes then put forward the common denominator for all democracies regardless of how they may style themselves (bourgeois, popular, liberal, socialist, direct, representative, Western, organic).

> "They are only real and pure democracies when they guarantee and respect human rights and fundamental freedoms, including in particular the right of everyone to participate in political life at the local and national level by means of free elections, enabling each people to choose freely and periodically its own government, and recognizing the activities of pluralist political institutions".

90. All the theoretical part of her subsequent thinking on the fundamental principles governing limitations or restrictions on rights to individual freedoms will constitute a vital contribution to the study of freedom of expression (legality, the rule of law, respect for the dignity of the individual, respect for proportionality, etc.).

(b) The Universal Declaration of the Rights of Peoples, known as the "Algiers Declaration"

91. This Declaration was adopted on 4 July 1976 on the initiative of a non-governmental organization - the International League for the Rights and the Liberation of Peoples - and therefore does not form part of positive international law. Nevertheless, it is interesting, in these times when civil society is a driving force, in that it suggests displacing the centre of gravity of international law concerning the individual and the State towards the people. Human rights become a major reference-point, according to the authors of the Declaration, in that the right to self-determination should not be limited solely to the right to external self-determination - in other words, to the right to be free from colonial, foreign or racist domination and to constitute a State. It is important to extend the idea to the rights of peoples to internal self-determination - in other words, to their right to a democratic government. This raises the question of pluralism as a pre-condition, in particular for freedom of expression. 6/

(c) The Siracusa principles

92. Another important contribution made by one of a number of non-governmental organizations, including the International Commission of Jurists, which are trying to establish principles of interpretation to be applied in justifying limitations in the form of restrictions and derogations is the elaboration of the so-called "Siracusa principles". These principles are of particular importance for the interpretation of the International Covenant on Civil and Political Rights. The grounds for the decisions adopted by the Human Rights Committee are often elliptical, but an analysis of European case law fully confirms the validity and relevance of the principles adopted at the Siracusa Conference. It therefore remains to be seen how these principles are interpreted in the context of the decisions adopted by the Human Rights Committee and of the case law of the European Court of Human Rights in which freedom of expression is involved.

2. The case law of protective bodies

93. At the moment the sources available to the authors of the present report are fairly limited. The authors have taken as a basis the selection of decisions adopted by the Human Rights Committee under the Optional Protocol from its second to its sixteenth session (CCPR/C/OP/1), the decisions included in the reports of the Human Rights Committee to the General Assembly from its thirty-ninth to its forty-fourth session (A/39/40-A/44/40), and the complete set of decisions adopted by the European Court of Human Rights; the authors may later on select decisions taken by the Commission concerning individual issues. The decisions of the Court of Justice of the European Communities have not, however, been considered, because they are too specific. Furthermore, because the documentation has not yet been received, the decisions of both the Inter-American Court of Human Rights and of the bodies concerned with ensuring respect for the African Charter on Human and Peoples' Rights have not yet been taken into account.

(a) The International Covenant on Civil and Political Rights

94. Most of the pertinent decisions of the Human Rights Committee established under the Covenant concern arrests, judgements and detentions, as well as persecution, under vague laws aimed at prohibiting "subversive associations" (Uruguay, communications Nos. 8/1977, 11/1977, 28/1977, 44/1979 and 52/1979), "subversive intrigues" (Zaire, communication No. 157/1983), "subversive activities" (Madagascar, communication No. 132/1982), "plotting against the régime" (Zaire, communication No. 138/1983), "undermining the internal and external security of the State" (Zaire, communication No. 124/1982). In all these cases, the Committee considered that what was involved was simply a restriction of freedom of expression as such, without any other motive, the allegations of subversion being in no way substantiated by the Governments concerned, and it found that article 19 had been violated. The Committee does not pronounce itself clearly on the question of legality, which a priori is not respected in the case of the very broad charge of "subversion" but took its stand on the principle of legitimacy to censure the misappropriations of the law practised by the authorities.

95. By resorting to this kind of charge, the States parties claim to guard against plots and to protect national security, but they do not demonstrate how national security or any of the purposes limitatively provided for by the Covenant made the restrictions which they applied necessary. The facts, then, remain. One of the applicants is a former trade-union leader, another supplied trade-union information, the third and fourth are known for their trade-union political activities, and two others are candidates for the presidency; some are parliamentarians who had sent an open letter to their President, and the last was the leader of a pro-democracy party. They merely exercised the right guaranteed to them under article 19, without there being any pertinent reason permitting its restriction. To limit these rights without further reason amounts to violating their very substance.

96. In the absence of any further Government information on the type, place and time of these allegedly subversive activities, the Committee held that there had been a violation, stating that the mere charge of subversion could not suffice in the absence of detailed information. States therefore do not

enjoy an unrestricted degree of discretion as to the legitimacy of the penalties they impose, and it is not enough merely to refer to one of the purposes laid down in article 19 (3) in order to evade supervision by the Committee.

97. In one of these cases, the Committee also reached a decision on the principle of proportionality, through article 25; this was in respect of communication No. 44/1979, according to which the person concerned was subjected, among other measures, to a suspension of his right to participate in public affairs, which article 25 of the Covenant guarantees "without unreasonable restrictions". After noting that the State had not produced any evidence as to the nature of the activities in which the applicant was reported to have participated and which had led to his arrest, detention and indictment, the Committee concluded that the latter were not justified on any of the grounds provided for in article 19 (3) of the Covenant. As far as article 25 was concerned, the Committee held that in no case could a person be subjected to such penalties solely because of his political opinions. Furthermore, the principle of proportionality would require that a penalty as severe as deprivation of all political rights for 15 years should be explicitly justified. Thus, in all these cases, the Committee used, more or less explicitly, the criteria of legality, legitimacy and proportionality.

98. In several cases, the Committee upheld the legitimacy of restrictions on freedom of expression on the ground of article 20, particularly in connection with an application in respect of which this freedom had been used to disseminate anti-semitic messages (YRTC/Canada, communication No. 104/1981) and with another involving the reorganization of a Fascist party (communication No. 117/1981).

99. The Committee showed itself to be much less protective where restrictions in the name of morality involving censorship and criminal proceedings in the case of television broadcasts on homosexuality in Finland were concerned. It held that the articles of the Finnish Penal Code classifying as offences immodest acts causing scandal and encouraging the public to engage in indecent behaviour between individuals of the same sex could validly constitute legal grounds, within the meaning of the Covenant, for the measures taken in the case in question. According to the Committee, the mere broadcasting of a debate on the subject may constitute an incitement to homosexuality. The Committee therefore interpreted the concept of legality very broadly and remained silent as to the foreseeable effect of the restriction. Homosexuality could not imply "indecency" and public debate "encouragement".

100. This approach is at least questionable. Public debate is the essence of democracy, and it is discriminatory against the homosexual minority, which deserves a protection equivalent to that afforded to everyone, to assimilate its sexuality to indecency. The Finnish Penal Code was precise, and the way in which it was applied was unforeseeable: it could therefore reasonably be considered that the elements constituting the offence were not all present.

101. As to legitimacy, the Committee has recognized that national authorities have a broad margin of discretion, since the concept of morality is essentially variable and there is, in this respect, no "universally applicable criterion". Although it is true that the concept of morality varies, there are universally acceptable criteria as to what could not be considered to be immoral: the exercise of the rights guaranteed by articles 2 and 7 of the

Universal Declaration of Human Rights, taken up by the Covenant in article 26. In the case in question, it seems dangerous to allow the concept of "morality" to be used to enable States parties to evade supervision by the Committee.

102. The case law relating to article 19 of the Covenant makes a relatively limited contribution to the elaboration of the concept of a democratic society. This is mainly due to the types of violation which the Committee has had to consider, involving the most spectacular and flagrant violations of article 6 (right to life), article 7 (protection against torture) and article 9 (liberty and security) of the Covenant. It must, however, be borne in mind that the Committee supervises both the legality and the legitimacy and necessity of restrictions.

(b) The European Convention on Human Rights

103. In all the nine cases which have been submitted to it, the European Court of Human Rights has had to examine restrictions concerning political, artistic, or commercial expression or general information disseminated through textbooks, press articles, or works of art involving journalists, publishers, officials, artists and veterinary surgeons. Incidentally, it will be noted that, unlike the Human Rights Committee in the application against Trinidad and Tobago (communication No. 360/1989), the European Court of Human Rights agreed to pronounce judgement in a case involving an application from a publisher, Markt Intern Verlag 7/

104. In most of these cases, the restrictions consisted of penal convictions for defamation (Lingens; Barfod), seizures of books and works of art (Handyside; Muller), injunctions and prohibitions on publication (The Sunday Times; Barthold; Markt Intern Verlag), limitations on access to the Civil Service (Glasenapp; Kosiek), disqualifications for collaborating with the occupying Power (de Becker, struck off the register). The Court found that violations had taken place in three of these cases (The Sunday Times; Barthold; Lingens) concerning press articles for failure to respect, on each occasion, "democratic necessity". In the other six cases (Handyside; Glasenapp; Kosiek; Muller; Barfod; and Markt Intern Verlag), it found that no violation had taken place.

105. Thus, through these cases the European Court has clearly established the three criteria for the admissibility of restrictions, which we shall summarize briefly in the following paragraphs. They are legality, legitimacy and democratic necessity.

Legality

106. The Court held that what was required was a basis in domestic law, which includes the common law (The Sunday Times). An ethical code is a law, within the meaning of the Convention, in so far as it emanates from an autonomous law-making authority by delegation from the legislature (Barthold). The law must be accessible and set forth with sufficient precision to enable everyone to regulate his conduct by having recourse, if necessary, to well-informed advice (The Sunday Times). However, the Court takes account of the

necessarily evolutionary nature of certain situations: thus, laws using broad concepts such as morality may have sufficiently foreseeable effects, since, according to the Court, it is not only impossible, but even inadvisable, to seek absolute precision in the drafting of laws (Barthold). The Court was referring, in particular, to competition, a problem in which the data constantly change as markets and means of communication evolve.

Legitimacy

107. The Court mainly checks that there has been no misappropriation of power by the State. One of the grounds exhaustively listed by the Convention (national security, territorial integrity or public safety, etc. ...) must be involved, and the Court verifies the sincerity of the allegations made by States in that regard. In all the cases brought before it, the Court has held that this criterion has been respected, whether what was concerned was morals (Handyside; Muller), the rights of others (Lingens; Bartholt; Markt Intern Verlag), or the impartiality and authority of the judiciary (The Sunday Times; Bartholt).

Democratic necessity

108. Here the case law of the Court is much richer. In the first place, the Court indicates that "necessary" means "imperative social need", not "indispensable", "reasonable", or "desirable". Moreover, the Court does not recognize that the degree of national discretion accorded to States is unlimited; it goes hand in hand with a European supervision whose intensity will vary depending upon how important the restriction is. The degree of discretion also varies according to the ground involving the public interest that is invoked. The Court, like the Committee, has thus recognized a broader degree of discretion for States when the protection of "morals" is involved. It has never held that a violation has been committed in such cases.

109. The Court then defines the concept of a democratic society, of which freedom of expression is one of the essential foundations, one of the basic conditions for its progress and for the fulfilment of each individual (Handyside). Freedom of expression is thus valid not only for information or ideas favourably received or considered to be inoffensive or unimportant, but also for ideas which clash with, shock or disturb the State or any section of its population. It is by virtue of the principles of pluralism, tolerance and open-mindedness, without which there is no democratic society, that the principle of proportionality, which is thus a criterion of democratic society, must be applied. The reasons invoked by the State must therefore be pertinent and sufficient, having regard to all the circumstances of the case. The Court compares the consequences, for the public interest, of the absence of restrictions with the consequences of any restriction for the individual concerned, having regard to the community's interest in being informed. According to the Court, it devolves upon the press to communicate information on questions debated in the political arena and also on any other sector of public interest; the Court also indicates that, in addition to this function of the press, there is the right of the public to receive such information (Lingens).

110. Moreover, the "free play of political debate" presupposes the recognition of a right of criticism as an essential condition for the functioning of a truly democratic political régime (Lingens). While taking care to state that

the protective aim of the Convention does not mean that absolute uniformity is required or that the substantive and procedural characteristics of the respective domestic laws of the States concerned could be disregarded (The Sunday Times), the Court points to a kind of common European tradition as a reference-point for democratic society. It is presumed that member States have at least one "common denominator" in the democratic tradition which has led them to become parties to the Convention. Here, the comparative law of member States serves as an instrument for evaluating the canons of a democratic society. Likewise, respect for the other provisions of the Convention constitutes evidence of this democratic necessity.

111. The Court has thus laid down standards that are sufficiently flexible to make it possible to evaluate the compatibility of different systems of law with the rules prescribed by the Convention and to prevent the concept of a democratic society from being congealed. It is, on the contrary, part of the very essence of such a society to evolve and to progress as a result of its tolerance, pluralism and open-mindedness. The Court envisages a democratic society as an evolutionary society founded upon freedom of expression; the criteria which it accepts are therefore flexible enough to follow up and respect changes in society.

(c) The Inter-American Court of Human Rights

112. It seems that it has not had occasion to reach a decision on the matter.

(d) The African Commission on Human and People's Rights

113. The situation is the same.

CHAPTER III

THE QUESTION OF PERMISSIBLE RESTRICTIONS

114. The analytical framework set out in the preceding chapters may be useful in addressing the main problems posed by this question, particularly as regards the issues most frequently raised in connection with reporting by States parties to the Human Rights Committee under article 40 of the Covenant. How are the problems to be considered in the light of the criteria of legality, legitimacy and democratic necessity? A restriction that is illegal, illegitimate or irreconcilable with the democratic spirit can never be permissible.

A. Principle of the legality of restrictions

Informal sanctions

115. The question of legality makes it possible to censure *a priori* all informal sanctions to be found in State practice which have no legal foundation, as well as sanctions based on provisions that are too broad. The duties and responsibilities of persons exercising their rights should be clearly defined, as should all sanctions which may affect them. Such sanctions should be characterized by the law in terms of all their constituent elements, especially the element of intent, which merits particular attention. The question of presumptions of bad faith, generally admitted by many domestic laws on false intelligence or defamation, should be examined; the reversal of such presumptions and the use of justifying facts should be subject to clear legal definitions designed to render them effective. Recourse to vague concepts should be limited by the requirement for a precise definition of these concepts in the actual text of the law employing them; this applies, for example, to the concept of "subversion", which is all too often used by States for political ends.

Preventive sanctions

116. Likewise, the question of preventive sanctions (censorship, prohibitions, seizure) raises a number of questions regarding the legality and the definition of the material and intentional elements of the actions covered and the damage likely to be caused (this relates to questions concerning legitimacy).

Individuality of sanctions

117. The precision of the normative texts is directly linked to respect for the principle of the individuality of sanctions, in prohibiting recourse to terms such as "influence", "frequentation" and "partisans". While the intention must be clearly characterized, the motive should not enter into the definition of the offences: in this regard, the concepts of attempt and complicity also deserve particular attention.

Safeguards

118. Precision of the texts is also essential in respect of safeguards (composition, independence and impartiality of the State supervisory bodies), remedies and methods of execution. Lastly, restrictive laws can only be subject to strict interpretation, and any extension by analogy should be forbidden.

B. Principle of the legitimacy of restrictions

119. The question of respect for legitimacy gives full meaning to the criterion of legality. Some sanctions established by law are taken under laws to which they are barely relevant. In other cases, the laws themselves serve none of the purposes considered to be legitimate within the meaning of the international instruments. It should be noted here once again that imprecision of the rules is conducive to such perversion of legitimacy.

1. With regard to persons

120. To what extent may the status of persons liable to sanction affect the principle of legitimacy, as for example in the case of officials, military personnel or aliens? Many constitutions and domestic laws establish reserve obligations applicable to officials, military personnel or members of certain professions. Failure to meet these obligations may, in addition to giving rise to criminal sanctions under ordinary law, constitute grounds for disciplinary measures, including dismissal or limitation of access to certain offices.

121. These protective provisions, moreover, usually affect only nationals or citizens. In addition, some provisions of the international instruments appear to allow certain restrictions only in respect of aliens. This is the case with article 16 of the European Convention on Human Rights, although this article has never been used, or with the American Convention on Human Rights, whose article 23 reserves to citizens the right to take part in the conduct of public affairs and have access to the public service.

122. The Inter-American Convention on the Status of Aliens for its part provided in article 7 that aliens must not engage in political activities which are the exclusive domain of the citizens of the country in which they are living. In the same way, article 5-2 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live (see para. 17 above) permits restrictions on the freedom of expression of aliens.

123. To what extent can these restrictions linked specifically to alien status be compatible with the principle of freedom of expression and information regardless of frontiers and with the principle of non-discrimination, which according to some international instruments can be subject to no limitation? It should be pointed out here that the Covenant guarantees the right to non-discrimination as such, unlike the European Convention, which does so only for the exercise of the rights it protects. The same question arises with regard to the rights of minorities including social minorities, such as the physically or mentally handicapped, minors, etc.

2. Prohibited grounds for legitimacy

124. The list of grounds for legitimacy is exhaustive. Considerations which are not permissible, for example, are those relating to the economic well-being of a country, to social or cultural interests or to religion. However, appeal to imprecise concepts such as "morality" allows these prohibitions to be circumvented, and the interpretation of international bodies, which are inclined to grant States a wide margin of discretion, is conducive to such shifts in trend. Might it be appropriate to maintain the idea of a margin of discretion differentiated according to the reasons given for legitimation? What view may be taken on Islamic morality, for example, as grounds for legitimation? By what criteria could it be regarded as less acceptable than Christian or Buddhist moral principles which in fact justify a number of restrictions implicitly? Would shifts be less great with one set of moral standards than with another? In any event, and whatever the nature of the moral standards invoked, it seems however that extreme vigilance must continue to be shown in this regard, especially so far as the protection of the freedom of expression of minorities is concerned.

125. The concept of public order, as the report by Mrs. Daes highlighted, raises above all the question of the legitimation of the role of the police and supervision of the courts, Parliament or other independent bodies competent to exercise police powers by the organs or agents of the State entrusted with the maintainance of public order. 8/ It will be noted here that the European Convention takes a broader view of "order", thus enabling the Court to legitimize sanctions on freedom of expression on the ground that the order must prevail within a particular social group. However, the Court pointed out that this applies especially when, as in the case of the armed forces, disorder in that group may affect order within society as a whole. With regard to the Covenant, therefore, the question arises as to whether indirect violations of public order have to be taken into consideration.

126. In the above-cited case, could legitimation not have been based on national security? It seems not, as that concept presupposes a criterion of seriousness linked to the use of force. National security cannot be invoked as a reason for imposing limitations merely to prevent local or relatively isolated threats to law and order (E/CN.4/1985/4, Annex, Siracusa Principles, para. 30).

3. An evolving margin of discretion

127. It should be recalled at this point that "public opinion" contributes widely to the definition of evolving concepts such as "public morals" or "public order" and that freedom of expression allows changes in public opinion in these areas to be taken into account. Public security has the particularity of allowing wider preventive measures.

128. Lastly, can the rights, freedoms and reputation of others which are affected mainly by defamation, slander or libel and invasions of privacy include other rights than those enumerated by the international instruments? Can they be used, for example, to guard against the expression of racist views? It seems that reference to democratic society allows for a very broad understanding of this concept.

129. The question of legitimacy should already make it possible to remove the objections which warranted the few remaining reservations to article 20 of the Covenant. Inasmuch as article 20 is somewhat redundant in relation to article 19, paragraph 3, and appears above all to have an educative and symbolic value, it is indeed difficult to understand why some States see broader restrictions on freedom of expression in its provisions than those permitted in article 19, paragraph 3. The rights of others and democratic necessity make it permissible to have penalties to combat propaganda for war and advocacy of racial hatred.

130. In this context, it will be useful to refer to article 7 of the European Convention on Transfrontier Television of 5 May 1989, which provides as follows in its paragraph 1, on "Responsibilities of the Broadcaster":

> "All items of programme services as concerns their presentation and content, shall respect the dignity of the human being and the fundamental rights of others.
>
> In particular, they shall not:
>
> (a) be indecent and in particular contain pornography;
>
> (b) give undue prominence to violence or be likely to incite racial hatred."

C. Principle of democratic necessity

131. This third criterion, which entails reference to the comparative law of States considered to be democratic, respect for all the rights guaranteed by the international instruments in force and the application of the principle of proportionality, should permit concrete analysis of the various types of sanctions which might be envisaged.

1. Comparative law

132. In this regard, it is worth while to restate the list of negative sanctions to which the non-governmental organization "Article 19" drew attention in a note addressed to the Rapporteurs.

(a) Sanctions against individuals

(i) Limitations on freedom of movement

133. Limitations on freedom of movement include: arrests with the obligation to report daily to the police; house arrests with the obligation to report to the police; confiscation of passports; refusal to authorize access to meetings or conferences; refusal of visas; expulsion or deportation; surveillance of a person's movements by the secret police; official escorts.

(ii) Sanctions affecting the individual's professional career

134. These sanctions include forced resignation; internal transfer, demotion, refusal of promotion; transfer from one region to another; prohibition on

writing or teaching; prohibition on meetings with the press, or on attending local meetings; prohibition on participation in elections; discrimination against women.

(iii) Physical and psychological pressure

135. Such pressure may be exerted in the following ways: injuries inflicted by the army while "covering" demonstrations; beatings by the police; threatening letters or telephone calls; incitement to commit murder; obligation to remain in hiding (for example, the Rushdie case).

(b) Sanctions affecting means of expression

(i) Measures affecting equipment or other professional tools

136. These measures include the following: confiscation of typewriters, photocopying machines, fax machines; suspension of telephone services; confiscation of computers; registering of typewriters and photocopying machines; jamming of lines and telephone tapping; control of paper.

(ii) Sanctions relating to means of expression and information

137. These sanctions include censorship of books and newspapers; control of imports of books and newspapers; destruction of books; raids on bookshops and press agencies; confiscation of books; jamming of radio and television broadcasts; censorship and banning of television programmes; confiscation, banning or censorship of films; banning of music and songs.

2. Prohibited sanctions

138. Observance of the rights guaranteed by all the international instruments totally precludes a number of sanctions.

(a) Sanctions violating inalienable rights

139. All sanctions which violate the inalienable rights of the individual are prohibited. Without entering here into the question of the hierarchy of the rights concerned, it is possible to classify the rights guaranteed as follows: (a) rights which are not subject to derogation or are inalienable even in an emergency situation; (b) rights which are not subject to derogation except in cases of emergency; and (c) rights which may be subject to restrictions, in the conditions we are studying, in normal circumstances.

140. Mrs. Questiaux identified in her report (E/CN.4/Sub.2/1982/15), a core of four inalienable rights common to all the international instruments that provide protection. These are the protection of life, the prohibition of torture, the prohibition of slavery and the retroactivity of criminal law. Any sanctions which affect the individual's life, health or dignity ought to receive special attention.

141. The difficulty is that, all too often, these sanctions are either not established by the laws of the States which apply them, or derive from practices not admitted by the official bodies which thus cover up actions by the police or the army, and thereby in effect encourage them. This question

is of crucial importance for freedom of expression: the victims of these prohibited measures are usually targeted because they exercise their freedom of expression (journalists, opposition party leaders, trade unionists) or because of the links they have or are assumed to have with the latter. An analysis of the aforementioned decisions taken by the Human Rights Committee at its second to sixteenth sessions (CCPR/C/OP/1) is revealing: of the seven allegations of violations of article 19, four also included allegations of torture; likewise, four of the nine alleged violations of article 7 of the Covenant concerned freedom of expression. The proportion indicated should, furthermore, be revised since it is in reality higher, the Committee being more able to accept evidence of ill-treatment than of violation of freedom of expression.

142. In addition, some submissions were considered only from the standpoint of compliance with article 6 (right to life), thus obscuring the fact that not only the individual, but also his freedom of expression was being jeopardized (see communications Nos. 146/1983 and 148 to 154/1983 - Khemraadi et al. v. Surinam). The use of such "sanctions" takes on alarming dimensions if it is recalled that in 1989 between 53 and 73 journalists were killed. There is an additional difficulty with regard to evidence: these practices are most often carried out either by uncontrolled groups or by groups acting in reality with the tacit approval of the authorities and presented as such. Thus, to take the example of the seven journalists who were killed in February 1990, official responsibility was recognized in only one case, 9/ the killings of the six others being the work of "unknown persons", separatists or persons described as men dressed in black or in military clothing.

143. It is therefore vital, in this regard, to develop a concept of positive obligations on the part of States to ensure observance of the freedom of expression of individuals residing in their territory that would prevent them from taking refuge behind these so-called "uncontrolled" elements in order to escape scrutiny by international bodies and evade the obligations which they have undertaken. Besides fulfilling the duty of abstention or non-interference, States must take any steps, especially in their criminal legislation, that will ensure that freedom of expression is exercised effectively and without risk. For the purpose of elaborating this concept, it will be necessary to work in close contact with the special rapporteurs responsible for these specific topics.

144. We may note, by way of example, the report on torture prepared by Mr. Kooijmans pursuant to Commission on Human Rights resolution 1988/32, which clearly defines the responsibilities which States must assume in this regard: "Governments have a special responsibility to investigate such allegations and to take all appropriate measures to prevent torture being practised by government agents ... Therefore, strict instructions should be given to the security forces to respect the prohibition of torture and violation of such instructions should be punished immediately" (E/CN.4/1989/15, para. 5).

145. The entry into force of the European Convention for the Prevention of Torture on 1 February 1988 and the ratification of the United Nations Convention against Torture by 39 States on 31 December 1988 is at least indicative of the fact that States recognize the urgency of the question.

(b) Exceptional circumstances permitting derogations from certain rights

146. Certain rights from which States may derogate under exceptional circumstances cannot, however, give rise to any restriction in normal circumstances. This is the case as regards the right to liberty and security of person and the right to a fair trial, for which exceptions are possible only as strictly defined by the instruments guaranteeing them.

147. Thus, the penalties involving deprivation of liberty which may be applied under criminal legislation on defamation or denunciation in bad faith, quite apart from the specific issue they raise with regard to the principle of proportionality, must always, without possible restriction, respect the principles set forth. This means devoting greater attention to the principles of legality and legitimacy: the grounds and procedures must be established by law (article 9, para. 1 of the Covenant and article 5, para. 1 of the European Convention); the person must be informed of the reasons for his arrest, and must be brought promptly before a competent court; he has the right to available remedies and to be released in the event of unlawful detention.

148. The problem of administrative detention arises here since this practice is more often than not likely to lead to violations of the inalienable rights set forth above and in article 10 of the Covenant. The combination of these principles and those of legality and legitimacy should totally exclude the holding of political prisoners or prisoners of conscience in any detention centre, but all too often actions may be treated as offences in the light of a perverted legitimacy: it is thus very difficult to distinguish between the expression of views contrary to the standards of morality and the expression of a political opinion, the political criterion remaining extremely ill-defined.

149. Lastly, the reference to a democratic society presupposes respect for all the other rights guaranteed to the individual, subject if necessary to permissible restrictions inasmuch as these rights may themselves affect the limitations on freedom of expression (freedom of movement, privacy, etc.).

3. The principle of proportionality

150. Particular attention ought to be devoted to measures which affect individual persons as such, in particular measures of detention.

151. Can the interests of society in having a person said to have abused his freedom of expression deprived of his liberty be considered sufficiently serious for public order or morals when a whole arsenal of measures may otherwise be available for dealing more simply with the information media? A distinction should thus be made between measures against the person and measures dealing with the media and means of expression. The question of the nature of the penalties to be imposed - criminal, administrative, civil or other - also needs to be raised.

(a) Sanctions against the person

(i) Detention

152. Regarding measures against the person, it seems that in any event deprivation of liberty is not only disproportionate in ensuring respect for public order, morality and so forth, but carries the inherent risk of leading to numerous violations of human rights. If it is to be retained in some areas, therefore, it should remain the exception and should be specifically justified, for example, by the seriousness of the threat which the abuse of the right to freedom of expression might present to rights guaranteed in other respects by the international instruments.

153. With regard to the necessity for prison sentences to secure respect for article 20 of the Covenant, account should be taken of the work of the special rapporteurs, particularly that of Mr. Kooijmans on torture, that of the Working Group on Enforced or Involuntary Disappearances and that of Mr. Joinet on administrative detention.

(ii) Restrictions on freedom of movement

154. These restrictions mainly affect foreign journalists and are varied in nature. They affect the individual and interfere with his work. This point should not be underestimated: too many countries, while wishing to democratize the rules governing freedom of expression and information, remain extremely restrictive with regard to foreign journalists. Likewise, in cases of conflict and tension, both internal and external, foreign journalists are generally the first targets of restrictive measures.

155. The international instruments as well as the bodies entrusted with protection seem extremely timid *vis-à-vis* freedom of movement, since the course of conduct that States adopt towards non-nationals is apparently based primarily on the attributes of their national sovereignty. Article 13 of the Covenant offers protection only in respect of expulsion, and this protection can be restricted only for compelling reasons of national security. Article 2 of the Fourth Protocol to the European Convention on Human Rights, which safeguards freedom of movement more extensively, also authorizes broader restrictions, in particular for a country's economic prosperity. Article 16 of the European Convention authorizes restrictions on the political activity of aliens, notably of the use they make of the rights protected in articles 10 (freedom of information and opinion), 11 (freedom of assembly) and 14 (principle of non-discrimination).

156. Some aspects of this question do not appear *a priori* to have been dealt with in the United Nations context. Restrictions on the freedom of movement of aliens may take many forms: refusal of visas, refusal of accreditation, confiscation of passports, prohibition on attending demonstrations or conferences, official escorts, obligation to report regularly to the police, administrative detention in airports. It therefore seems a matter of urgency to probe more deeply into this subject, and the work of the non-governmental organizations in this area could be a source of useful information. On 31 March 1990, Reporters sans frontières had already reported 18 expulsions between 1 January and that date. 10/

(iii) Loss and suspension of professional rights

157. These restrictions are another kind of measure aimed at the individual personally. Although some of them such as prohibitions on writing, teaching or taking part in press conferences, affect freedom of expression directly, others such as forced resignations, "shelving", blocking of promotions and transfers are more difficult to perceive. It is always difficult to adduce evidence of the actual extent of a measure or to obtain information on this kind of situation.

158. Although such restrictions are usually imposed by the authorities, they may also emanate from more or less structured groups in civil society such as religious sects, in which case the question of the positive obligations of States arises. As for the first type of restriction, it proves very difficult to monitor the principle of proportionality, in particular in the case of officials who may be prohibited from entering the Civil Service.

159. It should be noted that the European Court has been very restrictive in this respect, refusing to recognize a violation of article 10, on the ground that the Convention did not guarantee access to the Civil Service, while claiming, moreover, that the protection provided by this article did extend to officials. The European Commission, on its side, found it necessary in a democratic society to transfer a senior official of the Ministry of Foreign Affairs, in view of the duties attached to his post (D 9401181. DR 27/228). It also declared it necessary to suspend for several months the right to practise of a lawyer who made public statements capable of discrediting his profession or threatening the authority of the judiciary (D 10414/83. DR 40214). Although fines do not seem to raise any particular problems with regard to the principle of proportionality, further verifications might prove necessary.

160. With regard to the prejudice that "abuses" of the exercise of freedom of expression might cause to the rights of others, it might be advisable to give preference to compensation, or at least to make action by the authorities subject to a complaint by the victim, as is already the case with some legislations.

(b) Sanctions affecting the means of expression

161. Sanctions may also be directed either against professional equipment or the medium of expression itself.

(i) Technical equipment

162. The first kind of restriction includes the confiscation of equipment (machines, transmitters, photocopying machines, cameras) the destruction of film, confiscation of documentation and suspension of telephone services, measures which constitute varying degrees of harassment. They have greater effect when they are applied against aliens; nevertheless, they are very difficult to apprehend.

(ii) The information medium

163. More serious are the violations of the information medium, and, hence, its content (injunctions, bans on publications, confiscation or destruction of works, jamming of radio programmes, censorship, etc. ...). It does not seem advisable for the time being to make distinctions as to the nature of the content (artistic, political, commercial or other) of the expression, as the case law of the European Court is beginning to show. 11/ This type of distinction, although stemming from "good intentions", might prove dangerous; for example, it is very difficult to separate economic interests from political interests, and protection on several levels might be conducive to a shift towards minimal protection.

164. On the other hand, the nature of the medium is an element of greater importance; thus the destruction of newspapers is less serious than the destruction of works of art, which are unique and therefore irreparable. Respect for the principle of proportionality should preclude any definitive measures so as to take account of the evolutionary nature of democratic society.

(c) Self-censorship

165. Finally, respect for the principle of proportionality should enable light to be shed on the phenomena of self-censorship induced by the threat of highly dissuasive sanctions.

(d) Sanctions taken on the ground of exceptional circumstances

166. Finally, and according to the same criteria, special attention should be given to sanctions taken on the ground of exceptional circumstances. The first question that arises is whether freedom of expression should be included in the hard core of inalienable rights. There are several arguments in favour of this hypothesis.

167. In her aforementioned report (E/CN.4/Sub.2/1982/15), Mrs. Questiaux portrayed recourse to states of emergency as a means of preserving the model of a State subject to the rule of law. Yet how can this model be preserved without freedom of expression which is the very foundation of a State subject to the rule of law and a *sine qua non* of a democratic society, inasmuch as the exercise or protection of most of the other individual or collective rights is contingent upon it?

168. Exceptional circumstances and their corollary, emergency measures, require, a modicum of transparency in their implementation in order to avoid any likelihood of deviation, including that of perpetuating them. Finally, the usual interplay of restrictions should make it possible, on the ground of legitimacy and need, to strengthen certain measures temporarily if the circumstances so warrant. This approach, however, involves a serious risk in that it breaches the "national security clause" system and calls into question the need and validity of this clause from the standpoint of any other human right.

169. The Consideration of this aspect should begin with a systematic analysis of the restrictions most frequently imposed in exceptional circumstances, to see whether they could be justified on the basis of the usual restrictions or

whether they would not make it possible to consider circumscribing the recourse to this clause very strictly by limiting it to certain aspects only of the exercise of freedom of expression.

170. In conclusion on the question of negative sanctions, it seems that the study's starting point should be that of deprivations of liberty, in order to establish, as it were, a model for reference to the other sanctions envisaged to as to be able to treat them effectively. The deprivation of liberty raises questions at the level of legality as well as of legitimacy and democatic necessity; it should make it possible to deal with all specific cases of respect or lack of respect for these principles. Furthermore, the serious nature of this sanction makes its study particularly pressing. Subject to what has been said about the practice of torture, enforced disappearances or summary executions, it is realistic to begin with the sanctions that are the most categorical, and therefore easiest to perceive. The sanctions imposed by members of civil society will be considered from the viewpoint of positive obligations.

4. Media pluralism and democratic society

171. The European Court takes the approach that the principle of proportionality derives from the democratic spirit to the extent that, primarily the latter enables the pluralism inherent in any democratic society to be assured: "freedom of expression" obtains not only for "information" or "ideas" received favourably or considered to be inoffensive or unimportant, but also for those which offend, shock or disturb the State or a segment of the population. This is a requirement of the pluralism, tolerance and liberal approach without which there can be no "democratic society". It follows that, any "formality", "condition", "restriction" or "sanction" imposed in this respect must be in proportion to the legitimate goal pursued". (The Handyside case.)

172. Thus, the question arises of respect for pluralism in matters of freedom of expression, the latter being required to guarantee the former, notably in order to permit the activities of political institutions and to guarantee free elections. This approach is confirmed by article 3 of the First Protocol to the European Convention, which provides, "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

173. This is also emphasized in the above-mentioned work by Mrs. Daes (see para. 89) which accepts as a democratic feature of a society the fact that it recognizes "the right of everyone to participate in political life at the local and national level by means of free elections, enabling each people to choose freely and periodically its own Government, and recognizing the activities of pluralist political institutions" (E/CN.4/Sub.2/432/Rev.2, para. 314). Similarly, as noted earlier (para. 91) the Algiers Declaration refers to the "right of peoples to a democratic Government", thereby raising the question of pluralism as a prerequisite for freedom of expression. Finally, according to the Siracusa principles (see para. 92) it is for each State to demonstrate that these restrictions do not undermine the democratic functioning of society.

174. The principle of pluralism, which prevails over the principle of the majority, identified as a criterion of a democratic society in connection with negative sanctions, brings us to the question of the positive obligations of States to avoid concentrations of the press. In other words, the State must assure the exercise of the right to freedom of expression, notably by guaranteeing, the existence of media that can make this right effective. It must also ensure that freedom of expression is not threatened by third parties; since the individual is entitled to pluralist information, the State is bound to take all measures to assure diversity of the media.

175. The European Court has never been invited to study this question, but the Commission (Case of De Guillustreed Pers N.C.v/Netherlands) has noted that the problem of respect for article 10 of the Convention might arise if a State failed in its obligation to prevent excessive concentrations of the press (report of 6 July 1976, DR 8, P.5). From this viewpoint, the ownership, control and economic organization of the communications media in a democratic society should receive special attention. The problem of the monopolies and the authorizations agreed in principle and in certain conditions by the text of the European Convention, as interpreted by the Commission is also related to this question (case of Saachi v/Italy, 12 March 1970, DR 43).

176. The situation differs slightly according to whether it concerns the written press, which basically experiences financial constraints, or radio and television broadcasting, which are mainly concerned with question of prior authorizations. On the first point, mention should be made of the aid which the State has to provide, by measures such as government subsidies, tax exemptions and advertising receipts distributed among newspapers and periodicals, to enable minority opinions to be expressed. This implies intervention by the State in newspaper management; this intervention must therefore be regulated and clarified.

177. On the second point, there is agreement that radio broadcasting should be regulated by the State, if only with a view to assuring pluralism. This raises the question of equitable access to this communications medium, since contemporary technological developments are completely changing the conditions in which the traditional radio broadcasting bodies operated. Thus, for example, article 9 of the European Convention on Transfrontier Television of 5 May 1989 guarantees "access of the public to major events": "Each Party shall examine the legal measures to avoid the right of the public to information being undermined due to the exercise by a broadcaster of exclusive rights for the transmission or retransmission (...) of an event of high public interest and which has the effect of depriving a large part of the public in one or more other Parties of the opportunity to follow that event on television".

178. Although the European Commission believes that freedom to communicate information and ideas is necessarily limited in a State that makes use of the possibility offered to it by article 10 to make radio broadcasting, cinema and television companies subject to a system of authorization, it nevertheless makes a reservation in the case of "special circumstances" such as the exclusion of one political party from access to the radio during election time while other parties are granted broadcasting time (Case of X and Assoc. Z v/RU, 12 July 1971 Yearbook, Vol. 14, p. 549). Apart from these special

circumstances, therefore, the Commission agrees that a State may impose penalties to punish acts promoting unauthorized broadcasts (D 8266178 RU), 19 December, DR 161190).

179. Another aspect relevant to radio broadcasting involves the quantitative restrictions on advertising needed to maintain programme quality and the balance among the various modes of expression and in order not to deprive other media of advertising revenue. In this respect, the work of the European Economic Community might provide useful material for reflection. In particular, the Green Paper on the establishment of the common market for broadcasting, especially by satellite and cable, examines all questions related to recent technological developments and to the economic context (financing, competition, advertising, State subsidies etc.) from the viewpoint of the restrictions applicable to aliens and/or nationals with reference to article 10 of the European Convention of human rights (Communication of the Commission of European Communities to the Council, 14 June 1984, COM (84) 300 final).

180. The same approach is taken in the report to the European Parliament on the instruction aimed at co-ordinating certain legislative, statutory and administrative provisions of member States relating to broadcasting activities. Thus the rapporteur took the view that the organization of the European audio-visual space does not proceed solely from the desire to promote the audio-visual industry, but also from the Community's commitment to the requirements of a democratic society, such as, in particular, respect for media pluralism and freedom of expression. (Barzanti report 1987, paras. 2.2 and 3).

181. More recently, the Commission of the European Communities transmitted to the Council of Europe and the European Parliament a proposal for an instruction on audio-visual policy (Com (90) final, 22 February 1990), stating that there was a need for coherent action aimed at redressing obvious imbalances and monopolization of powers, developing without opposition on the international markets, while stressing the risk of serious contradictions between, on the one hand, the stated will to strengthen and promote pluralism (...), and, on the other, the attempt to standardize a medium which it would be very unfortunate to imprison in systems that were rigid, moralistic, or even based on censorship (p. 45, DE 113-272).

182. Finally, and for the same reasons, the case law on the subject of the Court of Justice of the European Communities should be taken into account in these issues.

183. The foregoing remarks on the concept of a democratic society reflect only the most typical legal criteria extracted from the case law of the international human rights protection bodies. However, they show that certain criteria could be developed in order to establish international legal standards, while other features intrinsic to the concept of a democratic society could be considered in the broader context of the realization of human rights.

CHAPTER IV

MATTERS TO BE INVESTIGATED WITH A VIEW TO THE PREPARATION OF THE FINAL REPORT

184. The Special Rapporteur recommend that the following questions should be studied in greater detail with a view to the preparation of the final report:

1. Restrictions and limitations, notably in respect of the desirability and feasibility of elaborating a threshold beyond which such restrictions and limitations might not be accepted.

2. The concept of a democratic society and the relationship between the content of the rights and their implementation.

3. The relationship between the right to freedom of opinion and expression, the right to freedom of association and assembly and the right to take part in the Government, directly or through freely chosen representatives, rights which are ways of making the effective exercise of this freedom possible.

4. Restrictions and limitations that are permissible when freedom of opinion and expression is used to spread racist or revisionist ideas.

5. Methods to guarantee media pluralism.

6. Sanctions:

   (a) A more comprehensive analysis based on relevant United Nations sources in respect of torture, summary executions, disappearances and imprisonment, as a consequence of the exercise of freedom of expression;

   (b) The consequences of the other sanctions mentioned earlier.

185. The Special Rapporteurs invite members of the Sub-Commission and observers to make suggestions and proposals on the various recommendations.

Notes

1/ See the report of the Working Group on Detention, document E/CN.4/Sub.2/1987/15, annex I, pp. 11 to 13.

2/ Adopted by the United Nations General Assembly in resolution 40/144 of 13 December 1985.

3/ G. Cohen-Jonathan, La Convention Européenne des Droits de l'Homme, Editions Economica, 1989.

4/ See in this connection the report by Mrs. Questiaux (E/CN.4/Sub.2/1982/15).

5/ Democracy, Oxford, Blackwell, 1975, p. 51 cited by Mrs. Daes in her study (E/CN.4/Sub.2/432/Rev.2, para. 308).

6/ Anne Combes Kaboré, La Déclaration d'Alger et l'intégration des nouveaux aspects des droits des peuples dans le droit international des droits de l'homme, a paper submitted to a seminar organized by the Association de Consultants internationaux en droits de l'homme (CID) on the contribution of NGOs to the elaboration and promotion of international human rights law held at the Palais des Nations, Geneva, on 4 May 1990, to be published.

7/ A recent decision concerning the prohibition of the re-transmission by cable in Switzerland of programmes broadcast by Italy, dated 28 March 1990, has just been made public by the European Court, which has found no violation of article 10.

8/ See also E/CN.4/1985/4, Annex, Siracusa Principles.

9/ Letter from Reporters san frontières no. 12.

10/ On the use by the European Court of Human Rights and the Court of Justice of the European Communities of the three criteria of legality, legitimacy and democratic necessity with respect to the freedom of movement of individuals, see Florence Massias, Police des étrangers et droits de l'homme en Europe, RSC, 1988, p. 223; see also F. Massias, "Police des étrangers" in Raisonner la raison d'Etat - Vers une Europe des droits de l'homme, p. 51, compendium, a collection edited by Mireille Delmas-Marty, collection Les voies du droit, Paris, Presses Universitaires de France, 1989.

11/ See Christian Jacq's contribution to the collection, Raisonner la raison d'état - vers une Europe des droits de l'homme, Paris, Presses Universitaires de France, 1989.

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Sub-Commission on Prevention of
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of Minorities
Forty-second session
Item 13 of the provisional agenda

HUMAN RIGHTS AND SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENTS

Proposals for a study of the problem of the environment and its relation to human rights

Note prepared by Ms. Fatma Zohra Ksentini pursuant to
Sub-Commission decision 1989/108

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INTRODUCTION

1. In decision 1989/108 dated 31 August 1989, adopted without a vote, the Sub-Commission on Prevention of Discrimination and Protection of Minorities asked Ms. Fatma Ksentini to prepare, without financial implications, a concise note setting forth methods by which a study could be made of the problem of the environment and its relation to human rights.

2. The above decision also indicates that the information on human rights and the environment provided to the Sub-Commission at its forty-first session by Friends of the Earth, the Sierra Club and the Association of Humanitarian Lawyers, and by certain members, together with the Environmental Perspective to the Year 2000 and Beyond (General Assembly resolution 42/186, dated 11 December 1987) justified consideration of whether the Sub-Commission should study this issue. The Sub-Commission also decided to request the Secretary-General to invite Governments, United Nations bodies concerned, specialized agencies, intergovernmental organizations and non-governmental organizations to submit relevant information and observations, preparatory to the working paper.

3. It should also be mentioned that on 6 March 1990 the Commission on Human Rights adopted resolution 1990/41, entitled "Human rights and the environment", in which it affirmed its awareness of the increasing environmental degradation and underscored the link between the preservation of the environment and the promotion of human rights. Moreover, the Commission welcomed the decision of the Sub-Commission to have a note prepared for its forty-second session on methods by which a study on the problems of the environment and its relation to human rights could be made.

4. It should also be mentioned that, although this is the first time the Sub-Commission has considered environmental problems as a whole and in relation to human rights, it has already dealt with some aspects of the problem, such as the movement and dumping of toxic and dangerous products and wastes (resolution 1988/26, dated 1 September 1988). 1/

5. Debates within the Sub-Commission and the Commission together with written observations submitted to the Special Rapporteur pursuant to resolution 1989/108 2/ have focused on the following points:

(a) A universal awareness of the scale, seriousness and complexity of environmental problems;

(b) The need for appropriate national, regional and international measures to address such problems;

(c) The manifest and/or close link between the environment and human rights, although the nature of the link is not always defined;

(d) However, some human rights violations are allegedly the causes of or factors in environmental degradation;

(e) Deterioration of the environment affects the enjoyment of human rights (life, health, work, information, participation, self-determination, the right to development, to peace and security, and so on ...);

(f) Specific regional and other development projects were advanced as illustrations of environmental degradation and infringement of human rights; 3/

(g) The Sub-Commission and the Commission on Human Rights should focus greater attention on the environmental problems that affect human rights.

6. At this stage it does not seem possible, within the confines of this brief note, to make an exhaustive analysis of the statements in the Sub-Commission, in the Commission on Human Rights or the communications submitted to the Special Rapporteur. These contributions provided valuable help in approaching the task and would make an extremely useful conceptual contribution to a study if the Sub-Commission decided to undertake one.

7. In view of the constraints that affect any brief note on a broad issue entailing complex factors and with a changing legal basis, it is impossible for the contents of this document to be seen as other than a set of working hypotheses that require deeper consideration, shaping of ideas and fine-tuning of the proposed approach.

8. Within the context of this preliminary note, the Special Rapporteur will none the less endeavour to identify the subject of a possible Sub-Commission study by putting forward a number of considerations on environmental issues in relation to human rights, together with some methodological aspects of the preparation of such a study.

I. CONSIDERATIONS REGARDING THE PROBLEM OF THE ENVIRONMENT IN RELATION TO HUMAN RIGHTS

A. General

9. For many years environmental problems were almost exclusively considered from the standpoint of the pollution in one part of the world, i.e. the industrialized countries. 4/ Acknowledgement of the link between the environment and human rights was fostered by an awareness of the global, complex, serious and multi-dimensional nature of environmental problems. Moreover, attention is being focused more and more on environmental deterioration wherever it occurs, on understanding its causes and on examining its repercussions and the risks involved.

10. This new attitude has the virtue of going beyond the limited framework and narrow vision that previously circumscribed environmental problems, and it tackles the issue from a universal angle, involving a global economic, social and cultural approach to which it adds the human dimension (the human right to a healthy and balanced environment and to "sustainable development"). 5/

11. Admittedly, this approach needs to be perfected - and this will certainly be one of the main objectives of the forthcoming United Nations Conference on Environment and Development scheduled for 1992 - particularly by taking into account the concerns of the developing countries in view of their vulnerability to damage to their ecosystems by internal as well as external

agents. However, the progress made towards understanding such phenomena that threaten our planet and even its very existence has to be acknowledged. These phenomena affect:

(a) The natural habitats (water, air, atmospheric pollution; the seas, oceans and rivers; destruction of the ozone layer, climatic change, global warming attributable to the greenhouse effect, etc.);

(b) Natural resources (desertification, deforestation, soil erosion, the extinction of certain species, degradation of flora and fauna, exhaustion of non-renewable, and particularly energy, resources);

(c) Human habitats and settlements (housing, town-planning, demography, etc.);

(d) Human beings (living conditions, working conditions, health, etc.).

12. Nowadays it is widely recognized that it is impossible to separate environmental problems from development problems - with their exigencies but also their constraints - and the problems of man's future as both agent and beneficiary of the right to development; moreover, human beings bear particular responsibility for preserving and managing the common heritage of mankind, which is also the heritage of future generations.

B. Outline of the emergence of a right to the environment

13. As early as 1968, in resolution 2398 (XXII), dated 3 December 1968, the United Nations General Assembly underscored the consequent effects of impairment of the quality of the human environment on the condition of man and on his enjoyment of basic human rights. In the same year, the Proclamation of Tehran drew attention to the fact that, while recent scientific discoveries and technological advances had opened vast prospects for economic, social and cultural progress, such developments might nevertheless endanger the rights and freedoms of individuals and would require continuing attention (A/CONF.32/41, Proclamation, para. 18). The Stockholm Declaration of 16 June 1972 went on to recognize the relationship between the environment, man and his basic rights, even the right to life itself.

14. Many documents have since been adopted by international, regional and national bodies to strengthen the notion of the right to the environment and underscore its interdependence with other human rights (the Declaration on Social Progress and Development adopted in General Assembly resolution 2542 (XXIV), dated 11 December 1969; the Charter of Economic Rights and Duties of States; 6/ United Nations environmental programmes, including resolution 42/186, dated 11 December 1987, relating to the Environmental Perspective to the Year 2000 and Beyond; 7/ General Assembly resolution 37/7, dated 28 October 1982, proclaiming the World Charter for Nature).

15. Many multilateral treaties deal with environmental protection and some of those relating to the limitation or prohibition of weapons and weapon tests (in particular tests of chemical and nuclear weapons) mention, at least implicitly, the need to protect the environment and contain provisions mentioning the dignity or well-being of man, health, or the general interest and thus establish an indissoluble link between the environment and human rights.

16. As to the regional level, in the African Charter on Human and Peoples' Rights article 24 stipulates that "all people shall have the right to a general satisfactory environment favourable to their development". Mention should also be made of the 1975 Final Act of the Conference on Security and Co-operation in Europe, not forgetting the numerous initiatives and proposals made in the Council of Europe to reinforce international machinery for protecting environmental rights and compensating victims.

17. The activities undertaken by UNEP, WHO, ILO, UNESCO 8/ and other intergovernmental and non-governmental institutions and the standards developed by them have contributed to the emergence of a genuine set of rules that lay the foundations for a right to the environment.

C. Conceptual aspects

18. The demand for a healthy and balanced environment has facilitated the transition from environmental law to the right to the environment. However, this concept remains imprecise without reference to a series of objectives that involve the idea of environmental conservation and protection of the fundamental rights of man and of his dignity.

19. The main conceptual issue that could be raised in respect of any study of the environment and human rights is the definition of the notion of a healthy and balanced environment, a definition which is all the more important in that it provides a yardstick against which infringements of human rights in relation to the environment can be measured.

20. Another issue is the linkage between the right to the environment and the other human rights. Is it possible directly to claim a right to the environment and any other ecological rights that might arise therefrom? Alternatively, is it necessary to prove that damage to the environment also affects a right that is already guaranteed? Once this has been established, what rights are likely to be affected by damage to the environment? Rights of the individual or collective rights or both? Civil rights, economic rights or all aspects of rights?

21. What position do ecological rights occupy within the hierarchy of human rights standards? Are they rights from which no derogation is possible? If not, what derogations would be acceptable? Are they rights subject to restriction? What restrictions would be permissible?

22. What would be the nature of such rights? Would they apply immediately? Are they "programmable" rights (i.e. rights to be implemented gradually such as economic rights, rights linked to development, etc.)?

23. What would be the object of ecological rights? Should the object of conservation of nature be man, since such conservation is warranted only on the grounds of the interests of mankind, or should the object cover all the elements of the biosphere as a whole, including the species, resources and the other components of nature? The list of human rights likely to be affected by environmental damage might vary, depending on how this question is answered.

24. In any event, it would be hard to deny that a right to the environment does exist. This right is an integral part of the set of norms that has been developed to protect the dignity of man and to promote and protect his rights. In this respect, it adds a new dimension to human rights and rounds them out. Consequently, it occupies a natural place in the category of "third generation" rights that adopt a multi-dimensional view of existence and restore to both individuals and peoples their rightful prerogatives and try to satisfy their legitimate aspirations.

II. METHODOLOGICAL CONSIDERATIONS FOR THE PREPARATION OF A STUDY

A. Topics on which the study might focus

25. In view of the scale, diversity and complexity of environmental problems, a descriptive study of them would be beyond the scope of the Sub-Commission's activities and might overlap with the work and studies carried out by other United Nations bodies. However, a general examination of the major features of environmental problems would make it possible to identify the risks they entail for human rights.

26. Particular emphasis could be laid on the essential factors involved, in particular the following: pollution of the natural environment, problems linked to natural resources, development problems, aspects linked to human habitats and settlements, and the rights of the individual.

27. The study should mainly try to highlight the relationship between environmental problems and human rights issues. To that end, a close examination of conceptual aspects could prove valuable (environmental law and the right to the environment; the right to the environment, ecological rights and human rights, etc.). As human rights may be affected by environmental problems, those rights that are likely to come into conflict with the requirements of environmental protection could be systematically analysed.

28. Few international human rights instruments include specific environmental provisions. However, many articles could be applied from an ecological angle. An analysis of the relevant articles of the following instruments could be undertaken:

(a) Universal Declaration of Human Rights

29. The fifth preambular paragraph (worth of the human person; social progress; better standard of life). Article 22 ("Everyone ... is entitled to realization ... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality"). Article 24 (the right to rest and leisure). Article 25 (the right to an adequate standard of living). Article 28 ("Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.").

(b) International Covenant on Economic, Social and Cultural Rights

30. Article 1 (the right of peoples to self-determination and freely dispose of their natural wealth and resources). Article 7 (a decent living, safe and healthy working conditions, rest and leisure). Article 11 (the right to an adequate standard of living, to be free from hunger; programmes to improve methods of production, conservation and distribution of food; disseminating knowledge of the principles of nutrition; measures to achieve the most efficient development and utilization of natural resources; equitable distribution of world food supplies). Article 12 (the right to health; steps to be taken for the healthy development of the child, the improvement of all aspects of environmental and industrial hygiene). Article 15 (the right to enjoy the benefits of scientific progress and its applications).

(c) International Covenant on Civil and Political Rights

31. Article 1 (the right of peoples to self-determination and freely dispose of their natural wealth and resources). Article 6 (the right to life). Article 7 (the prohibition of torture, cruel, inhuman or degrading treatment or punishment, medical or scientific experimentation without the consent of the person). Article 17 (arbitrary or unlawful interference with privacy or the family) and article 20 (the prohibition of any propaganda for war).

(d) The Proclamation of Tehran, article 18

(e) The Declaration on the Right to Development

(f) Convention on the Rights of the Child

32. Articles 6, 24, 27, 28 and 29 (in particular subparagraph (e): the education of the child shall be directed inter alia to the development of respect for the natural environment).

33. An examination could be made of aspects of human rights violations as causes of, or factors in, deterioration of the environment. By way of illustration, the following issues could be dealt with:

(a) Denial of the right of peoples to self-determination and freely dispose of their natural resources, and the harmful environmental repercussions (in particular the exhaustion of non-renewable resources; outward-oriented economies entailing a disruption of the ecological balance, soil erosion, deforestation, etc.);

(b) Failure to achieve the right to development, and its environmental consequences;

(c) The rights of indigenous peoples, the ecological requirements and constraints of development; 9/

(d) Violations of the right to popular participation, to the freedoms of association, assembly, expression and information as restrictions to the right to a healthy and satisfactory environment.

34. The relationship between the environment and human rights may also be considered by examining the effects of environmental degradation on the enjoyment of human rights:

(a) Particular attention could be focused on the right to life, not only on account of its fundamental nature as the source of all other human rights, but also on account of its extreme vulnerability to ecological hazards; 10/

(b) The right to health, healthy living and working conditions, to housing, protection of privacy and the family, to leisure, to an adequate standard of living, to healthy food, to information, to knowledge, and so forth.

35. Specific topics could be considered, such as:

(a) Non-discrimination and environmental problems (development plans favouring a region or submitting a sector of the population to unbearable ecological risk, etc.);

(b) The principle of equality and vulnerability to ecological risks, to environmental degradation and to natural disasters;

(c) Protection of pregnant women and of children from environmental dangers.

36. Particular attention could be paid to the acceptable and unacceptable limits that might define the requirements for a right to a healthy environment and to the enjoyment of other human rights. In turn, development problems could be pinpointed from the standpoint of environmental requirements.

37. A comparative study could be made of international, regional and national norms in order to specify the legal foundations of the right to the environment, the way in which it is exercised and the guarantees attaching to it. In this connection, it would be desirable to examine whether there is adequate legal protection of the right or whether machinery for implementing it needs to be strengthened.

38. Consideration could also be given to an analysis of the duties entailed by the right to the environment and the issue of compensation for victims.

39. A set of measures designed to guarantee and protect human rights and to ensure full enjoyment of the right to the environment could be recommended.

B. Recommendations

40. If the Sub-Commission decides to conduct a study of the problem of the environment and its relation to human rights it would be desirable for it to:

(a) Clearly define the subject and determine the principal or priority issues it considers most worth developing, taking into account the diversity of environmental problems;

(b) Initiate an in-depth debate on environmental problems within the Sub-Commission;

(c) Consider ways and means of collecting information of use for the study.

41. Care should be taken to ensure that the work of the Sub-Commission does not overlap with the activities of other United Nations bodies responsible for certain aspects of the issue. In addition, action by the Sub-Commission and the possible study should be undertaken with the United Nations Conference on the Environment and Development, scheduled for 1992, in mind.

Notes

1/ See also the report prepared by the Secretary-General in accordance with Commission on Human Rights resolution 1989/42 (E/CN.4/Sub.2/1989/3).

2/ The rapporteur received some 30 written observations.

3/ See, in particular, the written contributions and reports submitted to the rapporteur, to the Sub-Commission and to the Commission on Human Rights by the Association of Humanitarian Lawyers and the Sierra Club Legal Defense Fund.

4/ "Immediately after the Stockholm Conference, perception of environmental problems was limited to a specific geographical area, the industrialized countries, and reduced to the simplest of terms, pollution". Mohammed Sahnoun, "Environnement et développement", Revue algérienne des relations internationales, No. 8, 1987, OPU, Algiers.

5/ As regards this notion of "sustainable development", see the work of the World Commission on Environment and Development, General Assembly resolution 42/186 dated 11 December 1987 and entitled "Environmental Perspective to the Year 2000 and Beyond", and the above article by Mr. Mohammed Sahnoun.

6/ "By stating that economic, political and other relations must be governed in particular by the principle of respect for human rights and fundamental freedoms, this instrument asserts the need to work towards establishing the essential conditions for protecting, preserving and improving the environment". Andrzej Makarewiez, "La protection internationale du droit à l'environnement", Environnement et droits de l'homme, edited by Pascale Kromarek, UNESCO, 1987.

7/ See, also, General Assembly resolution 36/43, dated 19 November 1981, in which the General Assembly endorses the Global Strategy for Health for All by the Year 2000 adopted by the World Health Assembly in May 1981, and General Assembly resolution 37/137, relating to the publication and updating of a list of products harmful to health and the environment.

8/ See the WHO health standards; in addition, WHO plans to prepare a study highlighting the relationship between the right to health and human rights in connection with the environment. ILO has adopted a number of conventions on the working environment, in particular Conventions Nos. 13, 115, 136, 139, 148, 155, 81 and 129, and recommendations 114, 144, 147, 97, 156 and 164. In 1980, UNESCO organized a symposium on the new human rights and has published a work entitled Environnement et droits de l'homme (see note 6).

9/ It is worth mentioning that in June 1989 ILO adopted Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. In this Convention, the General Conference of the International Labour Organisation calls attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding, requests the adoption of special measures for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned and stresses the need for consultation and involvement of the peoples in decisions that affect them and the right to decide their own priorities as regards plans and programmes for development which may affect them directly. In December 1981, UNESCO adopted the Declaration of San José, which concerns the same issue.

10/ Professor Galicki (Poland) has submitted the following comments to the Special Rapporteur: "The right to life is the most important among all human rights legally guaranteed and protected by contemporary international law. On the other hand, the right to life is the one which is, most of all, connected to and dependent on proper protection of the human environment. It is because this right, like no other, may be directly and dangerously threatened by detrimental environmental measures. The right to life and the quality of life depend directly on positive or negative environmental conditions. Simultaneously, we cannot forget that this is an original right from which all other human rights derive".

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COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
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Item 5 (b) of the provisional agenda

ELIMINATION OF RACIAL DISCRIMINATION

ADVERSE CONSEQUENCES FOR THE ENJOYMENT OF HUMAN RIGHTS OF POLITICAL, MILITARY, ECONOMIC AND OTHER FORMS OF ASSISTANCE GIVEN TO THE RACIST AND COLONIALIST REGIME OF SOUTH AFRICA

Updated report prepared by
Mr. Ahmad M. Khalifa, Special Rapporteur

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ANNEX: South African transnational corporations abroad

I. BACKGROUND

1. In its resolution 3 (XXVI) of 19 September 1973, the Sub-Commission on Prevention of Discrimination and Protection of Minorities recommended that the Commission on Human Rights direct the Sub-Commission to appoint a Special Rapporteur to evaluate the adverse consequences for the enjoyment of human rights of assistance, in particular through investment of foreign capital and military aid, given to the racist régimes in southern Africa. Pursuant to the endorsement of that resolution by the Commission on Human Rights and the Economic and Social Council, the Sub-Commission, by its resolution 2 (XXVII) of 16 August 1974, appointed Mr. Ahmad M. Khalifa as Special Rapporteur for the preparation of a study on the subject. That study (E/CN.4/Sub.2/383) 1/ was submitted by Mr. Khalifa to the Sub-Commission at its thirtieth session, and was further considered by the Commission on Human Rights at its thirty-fourth session and by the General Assembly at its thirty-third session.

2. In its resolution 1 (XXX) of 26 August 1977, the Sub-Commission, having considered the report of Mr. Khalifa, invited the Special Rapporteur, as requested by the Commission on Human Rights, to prepare the necessary material for a provisional general list identifying those whose activities constituted assistance to the colonial and racist régimes in southern Africa.

3. The report prepared by Mr. Khalifa pursuant to that request (E/CN.4/425 and Corr.1-3 and Add.1-7) contained a provisional general list of banks, firms and other organizations which give assistance to the colonial and racist régimes in southern Africa as well as comments received by the Special Rapporteur from Governments on the subject.

4. By its resolution 2 (XXXIII) of 2 September 1980, the Sub-Commission, in accordance with Commission on Human Rights resolution 11 (XXXVI) of 26 February 1980, endorsed by the Economic and Social Council in its decision 1980/131 of 2 May 1980, decided to mandate the Special Rapporteur to continue to update the list annually and to smbmit the updated report through the Sub-Commission to the Commission. That decision was welcomed by the Commission in its resolution 8 (XXXVII) of 23 February 1981, and endorsed by the Economic and Social Council in its decision 1981/141 of 8 May 1981.

5. The General Assembly, at its thirty-fifth, thirty-seventh, thirty-ninth, forty-first and forty-third sessions (resolutions 35/32 of 14 November 1980, 37/39 of 3 December 1982, 39/15 of 23 November 1984, 41/95 of 4 December 1986 and 43/92 of 8 December 1988), and the Commission on Human Rights at its thirty-seventh to forty-fifth sessions (resolutions 8 (XXXVII) of 23 February 1981, 1982/12 of 25 February 1982, 1983/11 of 18 February 1983, 1984/6 of 28 February 1984, 1985/9 of 26 February 1985, 1986/6 of 28 February 1986, 1987/10 of 26 February 1987, 1988/12 of 29 February 1988 and 1989/6 of 23 February 1989) mandated the Special Rapporteur to update his report, subject to annual review.

6. On the basis of these resolutions and decisions, the Special Rapporteur, Mr. Khalifa, submitted the following reports:

E/CN.4/Sub.2/1982/10
E/CN.4/Sub.2/1983/6 and Add.1-2
E/CN.4/Sub.2/1984/8 and Add.1-2
E/CN.4/Sub.2/1985/8 and Add.1-2

E/CN.4/Sub.2/1987/8/Rev.1 and Add.1, parts I and II
E/CN.4/Sub.2/1988/6 and Add.1.
E/CN.4/Sub.2/1989/9 and Corr.1 and Add.1.

7. In its resolution 43/92 of 8 December 1988, the General Assembly, inter alia, expressed its appreciation to the Special Rapporteur for his updated report (E/CN.4/Sub.2/1988/6 and Add.1) and invited him:

> "(a) To continue to update, subject to annual review, the list of banks, transnational corporations and other organizations assisting the racist and colonialist régime of South Africa, giving such details regarding enterprises listed as the Rapporteur may consider necessary and appropriate, including explanations of responses, if any, and to submit the updated report to the General Assembly at its forty-fifth session;
>
> "(b) To use all available material from other United Nations organs, Member States, national liberation movements recognized by the Organization of African Unity, specialized agencies and other intergovernmental and non-governmental organizations, as well as other relevant sources, in order to indicate the volume, nature and adverse human consequences of the assistance given to the racist régime of South Africa;
>
> "(c) To intensify direct contacts with the United Nations Centre on Transnational Corporations, the Centre against Apartheid of the Secretariat and the United Nations Council for Namibia with a view to consolidating mutual co-operation in updating his report."

8. By the same resolution, the General Assembly requested the Special Rapporteur "to include in his updated report a list of partial disinvestment of foreign enterprises from South Africa, enumerating various techniques employed to avoid total withdrawal from participation in the South African economy". The Special Rapporteur has implemented this request of the General Assembly in his 1989 report (E/CN.4/Sub.2/1989/9 and Corr.1) which contained Chapter II entitled "Disinvestment trends in South Africa".

9. At its forty-sixth session, the Commission on Human Rights adopted resolutions 1990/22 and 1990/23 of 27 February 1990. In resolution 1990/22, the Commission, inter alia, expressed its appreciation to the Special Rapporteur for his updated report. In resolution 1990/23, it recommended that the Economic and Social Council invite the Special Rapporteur to continue to update his report.

10. Following the recommendations of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (resolution 1989/18 of 31 August 1989) and the Commission on Human Rights (resolution 1990/23), the Economic and Social Council, by resolution 1990/34 of 25 May 1990, inter alia, invited the Special Rapporteur to continue to update his report. The Council invited the Sub-Commission and the Commission on Human Rights to consider the revised report at their forty-second and forty-seventh sessions respectively.

11. In accordance with the said resolutions, the Special Rapporteur continued his contacts with the United Nations Centre on Transnational Corporations and the Centre against Apartheid. In 1990, he visited those two Centres and held meetings with the staff in charge. A useful exchange of views took place.

II. DISINVESTMENT TRENDS IN SOUTH AFRICA *̲/

A. Disinvestments and the state of the national economy

12. Since 1984, a number of large transnational corporations (TNCs) have sold their South African subsidiaries or affiliates or announced their intention of doing so. There is evidence, however, that several of the disinvesting companies maintain non-equity ties with the host country, thus defeating the very purpose of the idea of disinvestment action. Non-equity ties are established in three ways: first, through the licensing of production to another company based in South Africa or in a third country; secondly, through the licensing of production to a company that has been newly created; thirdly, through the licensing of production to a specially created trust. This type of arrangement enables the departing firm to continue its presence indirectly in the host country and ensure continuity in the transfer of technology.

13. It has been claimed that by mid-1988 some 46 per cent of the foreign subsidiaries operating in South Africa had been disinvested. There has been a sudden surge of some foreign companies to disinvest, but to what extent are they actually cutting their economic links with South Africa when withdrawing their direct operations or selling their South African assets? This problem has received only scant attention in the documentation on the subject.

14. It may be recalled at this stage that a number of developments, both internal and external, roughly coincided with the period of the 1980s when the debate on disinvestment from South Africa assumed considerable international importance. First, the overall investment rate (capital formation) of the economy showed a marked decline, from 26.4 per cent in 1980 to 19.5 per cent in 1987. The stagnant economic growth and sometimes negative growth rates of the South African economy recorded in 1982, 1983 and 1985 were mainly a reflection of this slow but steady deceleration in its overall investment ratio. Secondly, the fluctuating price of gold introduced a certain amount of instability in the country's external resources, which compelled recourse to exchange controls and other restrictive measures. Thirdly, a variety of internal developments, constituting an altogether different set of destabilizing factors, such as repeated states of emergency, media restrictions, mass detention, industrial action by workers, bannings, political trials, etc., produced a climate not conducive to business confidence. Recent studies on the South African economy conclude that, at the current annual population growth of 2.3 per cent (black population growth is 2.8 per cent), it is necessary for the economy to grow at a minimum of 5 per cent per annum to avoid further intensification of unemployment which, according to unofficial estimates, stands at as high as 6 million. Thus, as a consequence of declining finances, the volatility of gold-based export

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*̲/ The present chapter relies mainly on documents E/1989/17, E/C.10/1989/7, E/C.10/1989/8, E/C.10/1989/9, E/C.10/1988/7 submitted to the Commission on Transnational Corporations, and on the report prepared by Beate Klein, entitled "Transnational corporate disinvestment from Africa: Selective disengagement" (United Nations Centre against *Apartheid*, Notes and documents - 13/88, August 1988).

earnings, an annual inflation rate of about 15 per cent, repayment obligations of a debt of $US 27.5 billion, domestic budgetary management difficulties and "the rocky state of world markets" for trade and finance, the South African economy, if not heading for a breakdown, has been showing symptoms of fatigue.

B. Current trends in disinvestment

15. In a revised report (E/1989/17) of the United Nations Centre on Transnational Corporations in South Africa/Namibia, information on the current status of TNCs for 20 countries is provided under the following heads: (a) TNCs which have disposed of their equity interests in South Africa/Namibia; (b) TNCs with interests in companies (more than 10 per cent of equity ownership) in South Africa; (c) TNCs with interests in companies (10 per cent equity ownership) in Namibia; (d) TNCs in the process of disposing of their equity interests in South Africa/Namibia. This list was compiled and amended through use of all available sources of information such as annual reports, company directories, business and trade directories, specialized publications, magazines, etc., as well as through verification by the corporations concerned. However, it should be remembered that the eligibility criterion of 10 per cent equity ownership disqualifies many firms from inclusion in this list.

16. Of the 1,226 transnational corporations identified as operating through subsidiaries or affiliates in South Africa, 563 disposed of their equity interests between 1984 and 1988, that is, 46 per cent of the total number of TNCs in South Africa. Today, TNCs with equity interests in South Africa/Namibia account for slightly over 50 per cent. Some 31, or 2.5 per cent of the TNCs have reduced their equity interests in companies, and 16, or 1.3 per cent, of them are in the process of disposing of their equity interests. Among the major countries, the United States has disinvested almost 62 per cent, the United Kingdom 31 per cent and the Federal Republic of Germany about 22 per cent. Canada has pulled out 31 out of 39 companies, or 80 per cent, Australia 70 per cent, Sweden 59 per cent, Netherlands 45 per cent, France 42 per cent and Switzerland 14 per cent. Finland, Ireland and Norway withdrew their investments *in toto*, although their presence in South Africa was relatively small. On the other hand, Portugal, Spain and Luxembourg, each having only one company in South Africa, have not disinvested at all. The statistical account of disinvestments is impressive, but central to the debate over disinvestment is the extent and nature of non-equity relations that a foreign corporation retains after it has sold its equity position in a South African subsidiary or affiliate.

17. It should be pointed out here that restrictions on direct investments in South Africa through laws and decrees are the most common economic measures taken by Governments in the area of direct equity investments. A typical feature of most of these laws is that they permit existing levels of investment, but prohibit further investment through the new infusion or transfer of capital, or expansion of activities. The Nordic countries as far back as 1978 had enacted relevant legislation which has since been superseded by more advanced measures that they implemented subsequently. For example, Sweden's ban on new investments went into effect on 1 July 1985. It defined new investments in a fairly rigorous manner by including leasing of capital equipment, but allowing exceptions for new investments in "training, health and other social sectors" connected with humanitarian activities. That was

the policy adopted by the EEC Council of Ministers in October 1986, which took the decision to suspend new direct investments in South Africa, but allowed exceptions for activities involving the interests of the victims of apartheid. In the United States, section 5060 of the Anti-Apartheid Act of 1986 bans new investment, contribution of funds and loans or other extension of credit, but does not cover reinvestment of profits. Similarly, the Governments of Australia, Austria, Ireland, Luxembourg, France and Spain have enacted laws banning new investments in South Africa. However, the restrictions on the flow of direct foreign investment to South Africa through legislative measures do not imply outright disinvestment, although they have serious implications for South Africa's future economic growth. Side by side with such limitations of the restrictions on new investment imposed through legislative enactments, disinvestment actions by TNCs have in many cases been followed by licensing or other forms of surreptitious contractual agreements with their former subsidiaries that allow for the transfer of technology, which is so vital to South African industries. Some of the issues relating to licensing and non-equity participation by TNCs are discussed in the subsequent paragraphs.

C. Mechanics of disinvestment

18. Investment withdrawals take several forms, but for present purposes they can be broadly distinguished into three categories: first, total shut-down of operations, including sales and representative offices and subsidiaries; secondly, reduction of direct investment, i.e. partial sales and dilution; thirdly, sale of an ongoing operation to third party, local management and trust. Licensing agreements have been used in all these modes of withdrawal and constitute key components of all except the first option. The three methods of investment withdrawal are briefly examined below with reference to particular instances of disinvestment in order to ascertain to what extent economic links with South Africa are continuing through other arrangements by the departing companies.

1. Total shut-down of operations: sales and representative offices and subsidiaries

19. Since 1984, 32 TNCs have employed this method of withdrawal, which constitutes 9 per cent of the total disinvestment identified from available information. Among the firms that have chosen to disinvest in this way, 29 were from the United States, one from the United Kingdom and two from the Federal Republic of Germany. The Dresdner Bank of the Federal Republic of Germany and the Chase Manhattan Bank of the United States were the two prominent transnational banks that closed their representative offices in South Africa. However, the most widely publicized shut-down occurred in 1987, when the Eastman Kodak Company of the United States announced its sell-off and the closure of its marketing and photo-printing operations, even though the company had no manufacturing facilities in South Africa. Kodak also announced that its products would not be available to South African clients through any source. However, Kodak re-established its direct presence in South Africa in 1988 with the acquisition of Sterling Drug Inc., and Kodak products are still available in South Africa, although it is not clear how they get there. Therefore, a shut-down of operations does not necessarily mean an end to future commitments to South Africa. Thirteen of the 32 companies disinvested in this manner maintain ongoing relations in one form or another with South Africa.

2. Reduction of direct investment

20. This method includes partial sale and dilution of shareholdings. Since both partial sales and dilutions imply a reduction rather than a termination of South African holdings, it follows that the existence of ongoing relations are an integral part of these withdrawals. Both methods also represent the early stages of what will eventually become a total disinvestment. This was the case with Hill Samuel, Standard Chartered PLC and Metal Box, which disinvested totally from South Africa pursuant to reducing their stakes in the beginning. A total of 31 companies so far are reported to have reduced their equity interests by this method in South Africa and Namibia, accounting for 2.5 per cent of the overall disinvestment. Of these, 15 companies were from the United Kingdom, 12 from the United States and one each from Austria, France, Netherlands and Switzerland. This method of disinvesting, either by partial sale or dilution through mergers with other companies, reduce their exposure in South Africa without actual withdrawal of capital, but it is difficult to ascertain the economic or political impact of these measures, which will be relatively less than other methods of full-scale withdrawal. In many instances, partial sales amount to nothing more than change of ownership, and the parent companies retain more or less the same hold on the financial and commercial markets.

3. Sale of an ongoing operation

21. As mentioned before, this method normally takes three forms: (a) sale to a third party; (b) sale to local management; (c) sale to a trust.

(a) Sale to a third party

22. This is the simplest method of withdrawing from South Africa. This method was adopted by 118 firms and accounted for 35 per cent of the 339 disinvestment operations identified by mid-1988. Some argue that the departure of one nation's corporations simply permits transnationals of other nations to replace them. Although 70 per cent of the United States companies that were sold to a third party were sold to South African companies, in 28 cases of sale the third party remains unknown.

23. Moreover, available information on disinvesting companies shows that all known sales to third-party buyers entailed ongoing relations, and two thirds of those companies had arrangements for ongoing non-equity ties. No doubt, there has been a general decline in the significance of foreign ownership of investment in South Africa. In other words, there has been much greater domestic control of capital and more managerial powers over business by South African nationals as South African investors have displaced foreigners. But some of these new investors either simply continue the business unchanged or adjust it to fit into the pattern of the old régime. What is more, some of those who have close alignment with government groups have been able to make sensitive and strategic acquisitions through the disinvestment process, thus increasingly giving the Government access to foreign technology in return for the easy acquisitions of business that were made possible to them. For example, Allied Technologies (Altech), which is a major firm in the telecommunications industry in South Africa and which has offices in the United States, the United Kingdom and Japan, depends vitally on those links to maintain its access to the latest telecommunication technology. Altech holds

55 per cent of shares both in the former ITT subsidiary, Standard Telephone and Cables, and in the former subsidiary of the United States electronics and radio group, Motorola, now called Alcom Systems. Among Altech's electronic and telecommunication goods, one product is famous: a high frequency two-way radio which is a favourite of the South African security forces. Altech's list of well-known customers include the South African Reserve Bank, the Council for Scientific and Industrial Research, the South African Transport Services, the Department of Foreign Affairs, and the Post Office. Similar to Altech are the resourceful mining-finance houses and national saving institutions in South Africa which have been intimately involved in such lucrative acquisitions. In short, some of these disinvesting multinationals have not entirely disappeared from South Africa; on the contrary, the former subsidiaries in reality remain firmly rooted on the spot through ingenious devices such as voluntary mergers and easy acquisitions.

(b) Sale to local management

24. This form of sale has been employed in 36 cases, or 11 per cent of the disinvestments reported for South Africa. The normal process of a management buy-out is for the new management to raise a loan from an investment bank, usually with the assistance of the parent company, and then to use it to purchase a controlling interest in the subsidiary. In South Africa, however, the practice has often been for the disinvesting companies themselves to carry out the task of raising funds and settling deals. The arrangement suits them since it allows business to be conducted as usual by a management team that they know and trust. The "ex-subsidiary" then pays royalties or licence fees for the use of the parents' technology and processes, in addition to the purchase price. A management buy-out team is more dependent on the parent company for technology, patents and supplies than would be a third-party buyer. This dependence is attractive as it offers better prospects of a long-term relationship with the new company based on the provisions covered in the agreements. The big disinvestments, including General Electric, General Motors and International Business Machines of the United States and the Rover Group of the United Kingdom, have involved sales to local management. General Motors was sold to its local management on terms which required an adjunction of R 100 million from the parent company, and the subsidiary was sold to local management under the direction of an American former executive of General Motors. It is widely assumed that the contract, none of the details of which are known, includes a buy-back clause which would allow the parent to return openly when circumstances permit.

(c) Sale to a trust

25. In a trust arrangement, the departing company transfers its assets to the specially created trust, which pays for these assets out of future company earnings. The often complicated and confidential nature of trusts facilitates the position of those corporations that seek to keep open the option of re-entering the South African market. United States corporations that have utilized trust arrangements include Exxon, International Business Machines, Johnson Controls and the Ford Motor Company. The Swedish engineering group, Alfa Laval, announced in 1987 that it was transferring ownership of its South African subsidiary to a trust located outside South Africa. General Motors (United States) also combined disinvestment in a management buy-out and

an employee trust when it decided to leave South Africa in 1986. Trusts are established in conjunction with management buy-out arrangements, and the terms of the trust give the parent corporation an option to buy back the company.

4. Non-equity links

26. Disinvestments by transnational companies do not necessarily mean an end to business ties with South Africa. The companies find new ways of doing business there which may even be more profitable. Non-equity links pursued by TNCs allow them to do business more profitably than before in South Africa through licensing agreements and contracts with local companies without the political implication of direct investment. This method is euphemistically known as the "Japanese model", since several Western nations which are disinvesting in South Africa are following a model that has been well tested by Japan. Japanese economic interests have been represented by their companies having sales and representative offices in South Africa as well as indirect ties such as leasing and distribution agreements. For example, Japanese automobile companies like Toyota, Mazda and Nissan franchise their production to South African manufacturers, who use Japanese-supplied parts and manufacturing technology to build vehicles. Computers, chemicals and electronics have become their new fields of interest in South Africa.

27. Licensing agreements have an additional advantage over other modes of business links with South Africa. They yield royalty and licence payments which can be remitted at the higher "commercial rand" rate, while the proceeds of disinvestment have to be deposited in "financial rand" accounts and can be remitted abroad only at the lower "financial rand" exchange rate. Moreover, non-equity arrangements often include supply contracts, and the former parent companies thus have guaranteed export outlets for parts and finished products. The most recent data (1988) on non-equity links by multinationals in South Africa show that 85 of the 207 companies disinvested have retained some form of non-equity ties with South African operations. In the case of United States firms, 47 out of 77 have kept this link; United Kingdom companies have maintained 10 out of 55; Germany (Federal Republic of) firms, 10 out of 17; French firms, 4 out of 11; Canadian firms, 3 out of 13. The products licensed range from computers and electronic equipment to petrochemicals, pharmaceuticals, communications technology and agribusiness products. Thus only a few TNCs are breaking all business ties with South Africa - a situation that is quite contrary to the impression given by statistics on disinvestments.

III. SOUTH AFRICAN ECONOMY: SANCTIONS AND REACTIONS

A. Structural weaknesses of the apartheid economy

28. Structural flaws in the South African economy have long made it dependent on foreign funds to finance economic growth, making it extremely vulnerable to economic sanctions. This heavy dependence on foreign financing stems from the inability of the South African economy to generate sufficient domestic savings for domestic reinvestment, as well as the tendency for the current account of the balance of payments to be in deficit during periods of economic growth. This is largely due to the *apartheid* system itself. The South African economy has been in decline for two decades, although this has been hidden by heavy foreign borrowings and occasional gold price boosts. Sanctions have only exacerbated this decline.

29. In the 1960s and 1970s, it became increasingly difficult for South Africa to meet its investment needs. Local savings declined with falling growth rates, increased unemployment and lower per capita incomes. An increasing tax burden and inflation have meant that white consumers could maintain their living standards only by reducing their savings. In the public sector as well savings have lagged far behind investment demands. In 1977, public sector investment accounted for some 30 per cent of gross domestic expenditure of which the public authorities could only finance 22.6 per cent from their own current surpluses. Between 1956 and 1983, the share of the public sector in total foreign liabilities has grown rapidly. The growing dependence of the Government and public corporations on foreign loans has greatly increased the vulnerability of the South African economy to international pressures.

30. South Africa's large public sector reflects a policy of allocating capital based on strategic importance to the survival of the *apartheid* system, rather than social or economic factors and this entails enormous waste. The armed services account for 20 per cent of the Government's annual budget and 5 per cent of GNP. Military and police spending was increased by 22 per cent in 1988 and by 25 per cent in 1989 to R14.9 billion. Altogether, public expenditures account for nearly 40 per cent of Gross Domestic Product, with the military, police and related activities taking the largest share and the public sector employs about a third of the country's workforce.

31. Domestic savings are not only declining, but have not been translated into domestic fixed investment. On the contrary, since 1960, the share of domestic fixed investment in GDP growth has steadily declined. Despite low interest rates, gross domestic fixed investment fell steeply by 31 per cent (in real terms) between 1981 and 1987, reflecting loss of business confidence. This drop has been steepest in manufacturing where productive investment has even failed to keep up with depreciation. The result has been shrinking capacity, reduced production, loss in international competitivity, and a further loss of unemployment. In the 1980s, unemployment soared to its present level of 25 per cent to 30 per cent. In practical economic terms, then, disinvestment by domestic and foreign companies alike had begun long before the public campaign for sanctions and disinvestment had any impact. As long as South Africa had ready access to foreign capital, however, it could mask these distortions in its savings and investment structure by borrowing more heavily abroad.

32. The underlying defect in the South African economy lies in its export structure. South Africa is heavily dependent on foreign trade which accounts for 60 per cent of annual GDP. Export earnings are derived from primary and semi-processed products: minerals account for over 80 per cent, gold alone for over 40 per cent. Indeed, apart from foreign borrowings, boosts in gold prices have been the major factor in helping South Africa maintain equilibrium in its balance of payments. By contrast, manufacturing has failed to be competitive on the world market. Because of small domestic markets and scarcity of skilled labour, results of a system that keeps the masses of blacks impoverished and uneducated, the manufacturing sector has not been able to attain economies of scale or accumulate domestic technological expertise.

33. This dependence on primary exports renders the South African economy vulnerable to changes in the economies of its major trading partners and to fluctuations in world prices. Moreover, declining productivity is also affecting South Africa's primary industries. It is difficult to see how South Africa's gold mining industry can compete with countries that have increased their market share by using new mining methods and low-cost technology.

34. South Africa has a very high propensity to import during periods of growth resulting in persistent current account deficits. The country has been extremely dependent on imports of capital goods, intermediate goods such as oil, as well as other strategic items like arms and chemicals that it cannot produce for itself. Moreover, white consumers tend to demand high quality imports. Growth is increasingly consumer-led, and an upswing in the economy is usually accompanied by an expansion of consumer credit and a rise in demand for imported goods.

35. Distortions in the _apartheid_ economy are a part of the reason for this import dependence. There is a growing tendency to adopt capital-intensive modes of production because of the scarcity of skilled labour resulting from restrictions on education for non-whites, _de facto_ prohibition of black workers in white jobs, and high wages for skilled jobs. Moreover, South Africa has failed to develop its own capital goods sector. Attempts to promote import-substitution have not decreased its dependence on imports; much of the local production in the electronics and automobile sectors, for instance, is limited to local assembly of imported components or to production under licence. A major obstacle to South Africa becoming a modern industrial nation is the _apartheid_ system itself. Domestic markets are too small to finance research and development costs and skilled people are crucial to development of sophisticated high technology.

36. Because of this heavy dependence on imported capital and intermediate goods, an expansion in economic activity tends to increase the demand for imports and put pressure on the country's balance of payments. Previousy, South Africa would simply increase its foreign borrowings to offset current account deficits instead of slowing down the economy. Financial sanctions have deprived South Africa of this option, and also made it more difficult for the country to repay its existing indebtedness. Debt repayment now requires a surplus from trade, which of course is becoming much harder to earn. Sanctions, uncompetitiveness and volatile prices for primary exports mean that South Africa cannot rely on expanding its exports. The authorities have been compelled to curtail imports tightening policy and slowing down the economy. In the last quarter of 1987 and 1988 it became apparent that it was impossible

to create sustainable GDP growth in excess of about 2 per cent without exerting pressure on the current account. Estimates as to the rate of annual GDP growth needed to meet the rapidly growing black unemployment vary from a low 3.5 per cent-4 per cent to 6 per cent at the higher end of the range.

B. Measures undertaken by the Government of South Africa to counter sanctions

1. Debt moratorium and rescheduling

37. The fact that much of South Africa's borrowings had been in the form of short-term loans made it even more vulnerable to loss of international financial confidence. The Sharpeville killings of 1960 and the 1976 repression of the Soweto riots had caused a shift from medium- and long-term lending to short-term debt. In the face of international pressure against direct lending to the Pretoria régime, there was a shift to private interbank loans which helped disguise these transactions.

38. Political unrest following constitutional changes in 1983 and elections in 1984, repression and the declaration of the first state of emergency in July 1985, and subsequent pressures for sanctions, all contributed to substantial outflows of capital and cessation of loans to South Africa. International financial confidence had been considerably weakened. In mid-1985, South Africa faced a major financial crisis when the New York Times (31 July 1985) reported that Chase Manhattan had refused to roll over short-term credit or advance new credit, and other United States banks followed suit. The result of the 1985 crisis was to cut off South Africa from major capital markets and the cessation of all conventional lending.

39. In September 1985, to prevent a run on its foreign exchange reserves, the South African Government took two measures that were to play a key role in countering the impact of financial sanctions. First, the Government imposed a unilateral moratorium on the payment of the principal of short-term international debt falling due during the next four months, and subsequently extended this until the end of March 1986. Second, it reimposed the dual exchange rate system abandoned in 1983 which seeks to make capital placement in South Africa more attractive by increasing the cost of withdrawing it.

40. Anxious to restore normal relations with the international financial community and regain access to international financial markets, the South African Government also worked out three successive agreements with its creditors, in 1986, 1987 and 1989. In this way, South Africa sought to retain some of its funds and to buy time in which to re-establish the country's creditworthiness. The second and third agreements provided for 'exit options' that would allow for the conversion of short-term frozen debt into long-term 10-year loans.

41. These various rescheduling arrangements, considerably eased the pressure on South Africa by providing it with a financial lifeline to meet its repayment obligations. Converting short-term debt into 10-year exit options, with lenient debt repayment terms circumvent financial sanctions by functioning as new loans, moreover. In the absence of these measures, capital outflows would have been even more substantial and larger surpluses on the current account of the balance of payments would have been required to offset deficits on the capital account (current account surpluses that South Africa experienced between 1985 and 1989 were heavily influenced by gold sales, although the price of gold was on the decline).

42. Debt rescheduling has not helped restore South Africa's creditworthiness, however, and the country has failed to attract new loans and investments. At the same time, compulsory debt repayments and interests have, in the absence of new capital inflows, drained the economy. The debt crisis re-emerged in 1988 when debt repayments, a rise in imports stimulated by a minor economic boom and a drop in gold prices all contributed to a rapid deterioration in South Africa's foreign reserve position to levels barely sufficient for two months' import cover. Despite the leniency of the second interim agreement the situation worsened by September 1989, with the country's foreign reserve down to only R48 million or 3.4 days of import cover.

2. Dual exchange rate system

43. As a further measure to relieve the 1985 debt crisis, the South African Government reintroduced the dual exchange rate system, which consists of a 'commercial rand' and a 'financial rand'. The higher commercial rand rate is used for all transactions on the current account of the balance of payments, as well as for foreign loans. The low financial rand rate is used for transactions on the capital account, excluding loans. This is aimed at encouraging new direct investments and discouraging the repatriation by foreign companies of funds generated from disinvestment as well as outward investment by South African companies. The use of the financial rand for repatriation of disinvestment funds limits the drain on the country's foreign reserves. Drawing down foreign reserves would affect the country's capacity to meet its debt repayment obligations and to finance its essential imports.

44. Overall, the dual exchange rate system has had only a limited impact on capital inflow and outflow. Despite the expectations of the South African Government, restraints on repatriation appears to be discouraging rather than encouraging new direct investments. Moreover, disinvestors are cutting some of their losses by using non-equity links to repatriate licensing or franchise fees and royalties at the higher commercial rand rate.

3. Circumventing trade sanctions and obligatory counter-purchase

45. In the absence of capital inflows, South Africa has been forced to generate surpluses in the current account of its balance of trade to offset its debt repayments. In order to circumvent trade sanctions, the South African Government has sought in various ways to encourage avoidance, counter-trade and sanctions-busting. It has set up a special Secretariat for Unconventional Trade to establish sanctions-busting networks and provide advice to importers and exporters. The Private Sector Export Advisory Committee encourages private capital to engage in sanctions-busting activities. For instance, foreign companies eager to sell technology to South Africa or buy strategic minerals from South Africa are asked to buy South African exports or supply strategic imports such as oil and arms. Trade will largely take place through a third country in order to disguise its origins. The South African Government also facilitates 'unconventional' trade by concealing information on foreign trade and shipping traffic. It is illegal to divulge information on matters related to oil, uranium and nuclear technology.

46. Circumventing trade sanctions necessarily entail enormous costs, chiefly by increasing the number of middle-men and setting up of front companies or other links abroad. The costs of maintaining the infrastructure needed for

this conduit trade must be borne partially by the South African Government. Unconventional trade also entails paying a premium for imports and selling exports at a discount. The Commonwealth report on sanctions points out that, while the oil embargo failed to cut off South Africa's supplies of oil, it nevertheless succeeded in imposing an 'apartheid tax' on each litre of fuel used by South Africans. The costs of sanctions have forced the régime to invest in accumulating 'strategic' stockpiles. From January-April 1986, for instance, R2.6 million went to pay for 'unclassified imports'. This is a further drain on the financial resources of the economy.

4. Structural adjustment

47. The South African Government has turned to structural adjustment as a longer-term measure to liberate domestic resources for debt repayment. That is, it has sought a growth path that would not make demands on the country's scarce capital resources, and on imports. Measures include deregulation of the formal sector (as part of a broader strategy of 'inward industrialization'), import substitution and privatization of public enterprises and corporations, including parts of public utilities.

48. A strong lobby among economists and politicians in South Africa has argued that sanctions will help South Africa become more self-sufficient through import-substitution and inward industrialization. Domestic markets are too small to sustain growth, however. Efforts by South Africa in the past decade to become self-sufficient have not decreased the country's dependence on imports. South Africa's industry demands high technology inputs that cannot be produced domestically, and a highly skilled labour force, which is limited by apartheid.

49. South Africa has none the less invested heavily in the domestic production of 'strategic' items such as synthetic fuel, armaments, computers, chemicals and automobiles, all of which are heavily dependent on imports. Small domestic markets and spending on costly imports of capital and intermediate goods have made these projects highly cost-inefficient. Massive Government subsidies have been necessary to sustain projects like the SASOL oil-from-coal conversion plants and the Mossel Bay fuel-from-gas project designed to meet only 20 per cent-25 per cent and 10 per cent of South Africa's crude oil imports, respectively. South Africa is heavily dependent on foreign technology for both the exploration and manufacture of liquid fuels. It has been estimated that liquid fuels produced by SASOL would cost at least three times as much as oil bought on the international market. According to international experts, the Mossel Bay project will produce only about 25,000 barrels of fuel a day for the cost of R5,500 million, while a similar project overseas could be built to produce four times as much for only R100 million.

50. The South African Government's programme of structural reform also includes privatization of public enterprises and corporations. The proceeds from privatization are supposed to be spent on retiring public debt and developing infrastructure and small businesses. Part of it is to go to pay for the Government's 'repressive reform' policy. This aims to co-opt a small group of urban blacks in certain key townships through township-upgrading schemes with new houses, water and electricity, while at the same time increasing repression to silence the majority. Some observers believe that privatization is aimed at counteracting those sanctions which have been directed mainly against the Government and Government-owned bodies, however.

Still others see in it a pre-emptive effort to keep economic control in white hands in the event of a shift in political control to the black majority. With the parastatals in the hands of a white-controlled private sector, the political and economic leverage of any incoming government will be significantly reduced.

51. The various reform proposals are severely constrained by the apartheid system itself. Internationally, sanctions will make access to markets a continuing problem; internally, apartheid will mean small domestic markets and scarcity of skilled labour.

C. Shortcomings in the measures adopted by foreign Governments

52. Responses of the South African Government to economic sanctions have revealed some of the loopholes and shortcomings in the measures currently in force, such as: failure to adopt comprehensive mandatory sanctions because of opposition in the United Nations Security Council; limitations in the scope and narrowness in the interpretation of sanctions; and inadequate enforcement, monitoring and co-ordinating mechanisms.

53. With regard to trade, South Africa has been able to evade sanctions by diverting imports and exports through third countries and offshore facilities such as free ports and free-trade zones. In the conduit countries, various techniques are used to disguise the South African origin of the product. They include practices such as false labelling, acquiring false certificates of origin and transformation as in the case of coal channelled to Europe through Rotterdam and Antwerp. These often go without detection because of low priority given to enforcement and monitoring.

54. Sanctions have also been undermined by third countries taking advantage of sanctions imposed by other States. As the United States, Nordic and some Commonwealth countries have reduced their trade with South Africa, some countries in the Far East and Europe are increasing theirs. The Commonwealth report, however, warns against overemphasizing sanctions-busting and diversion of trade. Between 1985 and 1989, the increases in trade by South Africa's traditional trading partners such as West Germany, Japan, Taiwan and Spain have been much larger than trade with new partners.

55. The use of narrow definitions also restricts the range of products that bans are supposed to cover. For instance, "iron and steel" is usually interpreted as excluding iron ore and ferro-alloys, both of which are major South African exports. Japan bans the import of South African iron and steel but imports large quantities of iron ore. The United States continues to import South African uranium hexafluoride which it considers as falling outside its ban on "uranium ore and oxide".

56. Barter, counter-trade and joint marketing are on the rise as companies and the Government of South Africa take advantage of loopholes in regulations that do not prevent locally registered companies from trading in sanctioned goods in third countries or on the high seas. Sanctions-busting is also a result of the expansion of South African investment abroad (see Annex). Europe is the main destination, with 34.8 per cent going to EEC countries and 3.2 per cent to "other" European countries mainly Switzerland. Outward investment influences key markets for South African goods and improves access to new technologies, essential commodities and finance, all of which are of

strategic importance to the survival of the apartheid régime. The Commonwealth agreement of August 1986 refers only to majority-owned South African companies and to those based in South Africa. Luxembourg and Switzerland have been chosen by large South African conglomerates because they do not impose sanctions and because their legislation allow for secrecy with regard to corporate activities.

57. As regards foreign direct investment, most bans apply only to new direct investments and, with the exception of Nordic countries, exclude "non-equity" links. As a result, foreign companies can continue doing business with South Africa simply by shifting from earning profits directly to earning them indirectly. In fact, in some cases disinvestment has enabled companies to expand their markets in South Africa. The ban on new loans and credits to South Africa has been the most effective form of pressure on the apartheid régime. Nevertheless, South Africa has been able to extend itself a financial lifeline by exploiting loopholes in sanctions legislation. Rescheduling and the conversion of short- and medium-term debt into long-term loans may not be considered as "new loans" but they function as such. Loans, moreover, continue to be available for South African companies registered abroad. This loophole is likely to be increasingly exploited by South Africa to improve access to foreign borrowings.

58. The exclusion of trade credits from the 1985 moratorium and most sanctions legislation has made this virtually the only source of new foreign financing for South Africa and of crucial importance to its financial survival. The availability of trade credits, primarily suppliers' credits, for financing exports to South Africa have increased after mid-1986. These include official trade credits, guarantees and insurance, as well as off-balance-sheet support such as gold swaps and gold loans provided by Swiss banks. A recent report of the Centre against Apartheid indicates that some 30 per cent of South Africa's trade is currently backed by foreign Governments through their official export credit agencies, of which the biggest insurers are the United Kingdom and Japan.

59. Trade figures for the period 1986-1988 show that there has been a marked increase in exports to South Africa from the wealthiest countries: 72 per cent increase for the Federal Republic of Germany (qualified by the rise in the DM vis-à-vis the dollar which, in United States currency, overvalues the amount of exports paid for in marks), 50 per cent for Japan (qualified in the same way), 54 per cent for Britain, 41 per cent for the United States and 44 per cent for France. Payment for these exports would only have been possible if South Africa's major trading partners had provided guaranteed exports credits.

60. Overall, the sanctions measures adopted, particularly by South Africa's major trading partners, are far from satisfactory. Their impact has been greatly reduced by their failure to restrict imports of strategic mineral and by keeping certain channels open for technology transfer and credit.

IV. SOURCES USED FOR THE REPORT

61. The present report updates the reports submitted to the Sub-Commission at its fortieth (E/CN.4/Sub.2/1988/6 and Add.1) and forty-first (E/CN.4/Sub.2/1989/9 and Corr.1 and Add.1) sessions. The updating is based on information and material obtained from various sources consulted since the completion of the previous report and received by the Special Rapporteur before 25 June 1990.

62. Among various sources consulted, most of which were obtained in reply to the request for appropriate material addressed, in conformity with General Assembly resolution 43/92, to Governments, United Nations organs and bodies, specialized agencies, other intergovernmental organizations and non-governmental organizations, the documents listed below have been retained as new sources for the updated list.

Title of document	Source number 2/
United Nations Economic and Social Council Commission on Transnational Corporations. Second Public Hearings on the Activities of Transnational Corporations in South Africa and Namibia. Geneva, 4-6 September 1989 List of transnational corporations with interests in South Africa and Namibia Report of the United Nations Centre on Transnational Corporations (E/C.10/AC.4/1989/8)	1990-1
United Nations Council for Namibia Report on contacts between Member States and South Africa since the adoption of General Assembly resolution 43/26 A of 17 November 1988 Report of the Secretary-General (A/AC.131/315)	1990-2
United Nations Report of the intergovernmental group to monitor the supply and shipping of oil and petroleum products to South Africa (A/44/44)	1990-3
United Nations General Assembly Forty-fourth session Report of the Special Committee against *Apartheid* (A/44/22)	1990-4
United Nations Economic and Social Council Commission on Transnational Corporations. Public Hearings on the Activities of Transnational Corporations in South Africa and Namibia. 4-6 September 1989. The role of transnational banks in South Africa Report of the United Nations Centre on Transnational Corporations (E/C.10/AC.4/1989/6)	1990-5

Title of document	Source number
United Nations Economic and Social Council Commission on Transnational Corporations. Public Hearings on the Activities of Transnational Corporations in South Africa and Namibia. 4-6 September 1989. The South African economy and transnational corporations Report of the United Nations Centre on Transnational Corporations (E/C.10/AC.4/1989/5)	1990-6

Letters received from Governments

Denmark (2 March 1990)	1990-7

V. COMMENTS RECEIVED BY THE SPECIAL RAPPORTEUR

63. In accordance with General Assembly resolution 43/92, the Secretary-General sent a note verbale, dated 22 January 1990, to Governments and, on the same date, a letter to United Nations organs, specialized agencies, intergovernmental and non-governmental organizations concerned, asking them for appropriate material which could be used in updating the list.

A. Comments received from Governments

64. As at 25 June 1990, replies have been received from the following Governments: Byelorussian SSR, Czechoslovakia, Denmark, Mexico, Morocco, Panama and Uruguay. A summary of substantial replies 3/ is reproduced below.

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

[6 July 1989]
[Original: Russian]

1. The Byelorussian SSR supports the conclusion that economic, technical and military co-operation and the support given by international and national monopolies, as well as by a number of countries, to the ruling circles in South Africa are strengthening the criminal régime of apartheid and perpetuating the oppression of the African majority of that country's population. They are helping to intensify repression against fighters for civil, political, economic and other rights. Thus, by their co-operation with South Africa, transnational corporations are directly responsible for participating in acts which, according to article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid, are classified as "the crime of apartheid".

2. In pursuance of the relevant decisions of the United Nations, the Byelorussian SSR has not maintained, and does not maintain, any relations with South Africa in the political, economic, military or any other field and accordingly does not have any contractual or licensing agreements with the racist régime in Pretoria.

3. The competent organizations and departments of the Byelorussian SSR strictly supervise compliance in practice with the relevant resolutions and decisions on the isolation of the apartheid régime in South Africa adopted by the United Nations Security Council and General Assembly.

CZECHOSLOVAKIA

[7 July 1989]
[Original: English]

1. Czechoslovakia is of the opinion that one of the most effective ways of compelling the South African Government by lawful means to reverse its policy toward the black majority in the country consists in complete isolation of South Africa in all spheres by all countries, particularly the most influential ones, on the basis of United Nations decisions.

2. Czechoslovakia has been reaffirming through concrete deeds the negative attitude of its Government to any form of co-operation with the South African

régime of apartheid and its full support for all activities of the international community, international bodies and organizations, particularly the United Nations, and other governmental as well as non-governmental institutions which are aimed at combating the policies and practices of apartheid. Czechoslovakia's principled position is best illustrated by the fact that it severed as early as 1962 all diplomatic, economic, scientific, cultural and sports-related contacts with South Africa and has taken resolute internal measures toward complete isolation of the racist South African régime. At present, it does not maintain any relations with South Africa nor do any transnational corporations maintaining such relations operate in Czechoslovak territory. Economic relations with South Africa are prohibited in the Czechoslovak Socialist Republic by a universally binding legal regulation [Decree No. 65/1980, Collection of Laws, of the Federal Ministry of Foreign Trade on Prohibition of Economic Contacts with South Africa].

DENMARK

[2 March 1990]
[Original: English]

1. As of today, the below-mentioned Danish companies are the only ones which still maintain economic activities in South Africa. Consequently, the list in the next Report should comprise only these Danish companies: East Asiatic Company; Sophus Berendsen A/S (Rentokil); Novo-nordisk A/S; and F.L. Smidth & Co. A/S.

2. The below-mentioned Danish companies referred to on pages 10-11 of the 1989 Report (E/CN.4/Sub.2/1989/9/Add.1) have all ceased their exports to and other economic activities in South Africa and should consequently be deleted from the list: Aarhus Oliefabrik A/S; Andersen & Bruun's Fabrikker A/S; Esbjerg Matador Maskiner A/S; Schmidt & Jessen A/S; Skandinavisk Holdings; Danfoss A/S; Bruel & Kjaer A/S; and Bang & Olufsen.

MEXICO

[22 March 1990]
[Original: Spanish]

1. The Government of Mexico has been in favour of the imposition of broad-ranging compulsory sanctions on South Africa, in keeping with Chapter VII of the Charter of the United Nations, and in conformity with the provisions of the relevant resolutions of the General Assembly it has adopted various measures to bring greater pressure to bear on the South African authorities to give up their policies of discrimination.

2. Mexico does not maintain diplomatic or consular relations with South Africa. In conformity with the provisions of General Assembly resolution 2671 (XXV), Mexico closed down its consulate in South Africa in 1974. The Government of Mexico has endeavoured to comply strictly with th resolutions adopted by the General Assembly in connection with the suspension of economic, financial, trade and other relations with South Africa. Similarly, Mexico has fully observed the arms embargo on South Africa, imposed by the Security Council under resolution 418 (1977).

3. Again, Mexico has abided by the various General Assembly resolutions concerning the oil embargo on South Africa. To this end, in all Petróleos Mexicanos (PEMEX) contracts for the sale of crude, it is stipulated that Mexican crude is sold only for the end-users, the aim being to prevent any resale or barter of our petroleum. Moreover, it is specified that PEMEX must regularly inform its clients that any operation of this type excludes South Africa and that failure to meet this obligation brings the contract to an end.

4. Lastly, on 30 October 1987 the Diario Oficial (Official Gazette) published the decree prohibiting imports and exports of goods originating in or from South Africa or intended for that country, including goods passing in transit through third countries but originating in or intended for South Africa.

MOROCCO

[8 May 1990]
[Original: French]

Morocco fully observes the measures taken by the various United Nations organs in the context of the embargo imposed on South Africa and, consequently, maintains no political, economic, military or trade relations with the Government of that country.

PANAMA

[12 March 1990]
[Original: Spanish]

The Republic of Panama, in keeping with its policy, has signed no treaties or agreements whatsoever with South Africa and has no diplomatic, consular or trade relations with the Government.

URUGUAY

[10 February 1990]
[Original: Spanish]

The Eastern Republic of Uruguay, mindful of the decisions adopted by the international community, renders no political, military, economic or other assistance to the racist régime of South Africa. The measures our country has taken in the condemnation of the institutionalized system of racial discrimination include the following:

(a) The decision by Uruguay to change the Diplomatic Mission at Cape Town into a Consulate General;

(b) The requirement that visas must be issued to South African citizens with the express authorization of the Ministry of Foreign Affairs;

(c) The recommendation to Uruguayan sportsmen and artists that they should refrain from participating in sports or cultural events organized by South Africa.

B. Comments received from United Nations organs and specialized agencies 4/

65. The United Nations Centre against Apartheid transmitted a copy of the 1989 Report of the Special Committee against Apartheid (A/44/22) and the report of the Secretary-General on policies of apartheid of the Government of South Africa (Restrictive measures affecting externally dependent areas of the South African economy. Report of the Centre against Apartheid (A/44/555).

66. The United Nations Centre on Transnational Corporations transmitted copies of the reports prepared by the Centre for the Public Hearings on the Activities of Transnational Corporations in South Africa and Namibia held in Geneva from 4 to 6 September 1989, and the report on measures on trade, finance, investment and technology transfers to South Africa prepared for the sixteenth session of the Commission on Transnational Corporations (E/C.10/1990/8).

67. The United Nations Commissioner for Namibia transmitted a copy of the 1989 Report of the United Nations Council for Namibia (A/44/24).

68. Replies were also received from the Committee on the Exercise of the Inalienable Rights of the Palestinian People, the Special Committee of 24, the United Nations Centre for Science and Technology for Development, the United Nations Office of the Disaster Relief Co-ordinator (UNDRO) and the Department for International Economic and Social Affairs.

69. The International Labour Organisation (ILO) transmitted a copy of the special report of the Director-General on the application of the Declaration concerning action against apartheid in South Africa and Namibia submitted to the seventy-seventh session of the International Labour Conference, 1990.

70. The United Nations Educational, Scientific and Cultural Organization (UNESCO) reported that UNESCO had no relations with any bank, transnational corporation or other organization assisting the racist and colonialist régime of South Africa.

71. The Universal Postal Union (UPU) recalled that by its resolution C7 the 1984 Universal Postal Congress at Hamburg excluded South Africa from UPU because of that country's apartheid policy and that the International Bureau had thereupon ceased all relations with the South African postal administration.

72. Replies were also received from the Food and Agriculture Organization of the United Nations (FAO) and the International Maritime Organization (IMO).

C. Other replies 5/

73. Replies were also received from the following:

Regional intergovernmental organizations

- Commission of European Communities

- League of Arab States

- Organization of African Trade Union Unity

Non-governmental organizations

- International Defence and Aid Fund for Southern Africa
- International Federation Terre des Hommes
- Inter-Parliamentary Union
- League of Red Cross and Red Crescent Societies
- World Muslim Congress

VI. STRUCTURE AND CONTENTS OF THE UPDATED LIST

A. Guide to the updated comprehensive list

74. The updated comprehensive list (contained in Add.1 to the present document) presents names of transnational corporations, banks, insurance companies, firms, and other enterprises giving, either directly or indirectly, military, economic, financial and other assistance to the racist and colonialist régime of South Africa. The list was updated on the basis of material and information examined by the Special Rapporteur since the completion of the previous reports (E/CN.4/Sub.2/1988/6/Add.1 and E/CN.4/Sub.2/1989/9/Add.1). Two annexes are attached to the updated list. Annex I contains new names brought to the attention of the Special Rapporteur since his previous report (E/CN.4/Sub.2/1989/9/Add.1). Annex II contains names which have been deleted from the list according to information available to the Special Rapporteur or brought to his attention indicating that economic and other activities with and in South Africa have been discontinued.

75. In view of recent attainment of independence by Namibia, the names of all banks, companies and other institutions giving assistance to Namibia only, as contained in previous reports, had been deleted from the list. Also deleted were all references to Namibia in the column indicating the recipient of assistance (see para. 76 below).

76. In addendum 1 a country-by-country list is provided. The list is alphabetized according to the nationality of each ban, company or firm cited. Following the code of the country, the name of the bank or company involved is mentioned. The third column indicates the type of entity involved, which may be a firm, bank, financial institution or insurance company. The fourth column refers to the type of assistance provided which, depending on the case, has been classified as economic, military, financial, nuclear or a combination of a number of these categories. The last column on the right indicates the recipient of assistance (see also para. 75 above).

77. In the second line of each entry, reference is made to the source in which the information was found, followed by the relevant page, paragraph or appendix.

78. This report is available in all official United Nations languages. In view of the fact that the updated comprehensive list (Add.1 of the present report) is prepared with the assistance of computer facilities, it is only available in English.

B. List of symbols and abbreviations

79. In order to facilitate the reading and comprehension of the list, a key to all abbreviations used is provided below:

1. Countries and territories */

AUS	Australia
AUT	Austria
BEL	Belgium
BHS	Bahamas
BRA	Brazil
CAN	Canada
CHE	Switzerland
DEU	Germany, Federal Republic of
DNK	Denmark
ESP	Spain
FIN	Finland
FRA	France
GBR	United Kingdom
GRC	Greece
HKG	Hong Kong
HSE	Holy See
ISR	Israel
ITA	Italy
JPN	Japan
LIE	Liechtenstein
LUX	Luxembourg
MCO	Monaco
MYS	Malaysia
NLD	Netherlands
NOR	Norway
PRT	Portugal
SWE	Sweden
TAI	Taiwan, Province of China
USA	United States of America

2. Other symbols and abbreviations

B = Bank/insurance company/financial institution
E = Economic (assistance)
F = Firm
Fi = Financial (assistance)
M = Military (assistance)
NI = Not identified
N = Nuclear (assistance)
SA = South Africa

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*/ The codes for the representation of names of countries are in conformity with the Alpha 3 codes of the alphabetical list of entities and codes in English contained in section one of *Codes for the representation of names of countries*, second edition - 1981-05-15, International Organization for Standardization, *International Standard*, ISO 3166.

Notes

1/ Subsequently revised (E/CN.4/Sub.2/383/Rev.2) and issued as a United Nations publication (Sales No. E.79.XIV.3).

2/ Each source has been given a number (1990-..) for easy reference in the addendum to the present report. The reference to the year 1990 means that the source has been used in the preparation of the 1990 updated report.

3/ The full text of these replies are available for consultation in the secretariat files.

4/ The full texts of the comments received are available for consultation in the secretariat files.

5/ The texts of these communications are available for consultation in the secretariat files.

ANNEX

SOUTH AFRICAN TRANSNATIONAL CORPORATIONS ABROAD

COMPANY	*SUBSIDIARY*	*TYPE OF INDUSTRY*	*COUNTRY OF INVESTMENT*
Abercom Group Ltd.	American Davidson Inc.	Engineering	U.S.A.
	Berry Davidson S.A.	Industrial fans	France
	Davidson of Australia (Pty) Ltd.	–	Australia
	Davidson & Company Ltd.	Power station fans	U.K.
	Davidson Group Ltd.	–	Jersey
	Davidson N.V.	–	Netherlands Antilles
	MacBoer B.V.	–	The Netherlands
	SATAS (U.K.) Ltd.	-	U.K.
Adcock Ingram Ltd.	Keatings Finance Establishment (Lichtenstein)	Financing	Lichtenstein
	Datlabs (PVT) Ltd. (Zimbabwe)	Pharmaceutical manufacture and distribution	Zimbabwe
Die Afrikaanse Pers (1962) BPK	Republican News Agencies (PVT) Ltd.	News Agencies	Zimbabwe
Allied Technologies Ltd.	Calvert Holding Inc.	Technologies	U.S.A.
Amalgamated Retail Ltd.	Scotts Retail (Lesotho) (Pty) Ltd.	Retailers	Lesotho
	Scotts Retail (Swaziland)	Retailers	Swaziland
	Geen & Richards (Swaziland) (Pty) Ltd.	Chain-stores	Swaziland
	Shoecorp Shoe Stores (Lesotho) (Pty) Ltd.	Shoe stores	Lesotho
	Shoecorp Shoe Stores (Swaziland) (Pty) Ltd.	Shoe stores	Swaziland
Anglo-American Coal Corp. Ltd.	Gatooma Magnesite (PJT) Ltd.	Magnesite	Zimbabwe
	Refractory Products Ltd.	Refractory products	Zimbabwe
Anglo-American Corp. of South Africa Ltd.	Angborne Investments Australia (Pty) Ltd.	Investments	Australia
	Ausrand (Pty) Ltd.	–	Australia
	Spinifex Finance (Pty) Ltd.	Finances	Australia
	Australian Anglo-American Services Ltd.	Services	Australia
	Anglo-American Investment Trust (Bermuda) Ltd.	Investment Trust	Bermuda
	Anglo-American Corp. Botswana (Services) (Pty) Ltd.	Services	Botswana
	West End Property Co. (Pty) Ltd.	Properties	Botswana
	Morupule Colliery (Pty) Ltd.	Mining	Botswana
	Compagnie Financière Eurafricaine S.A.	Financing	France
	Bureau d'Opérations Industrielles et Commerciales	Industrial and commercial operations	France
	Charter France S.A.	–	France
	Charter France Services S.A.	–	France
	Anglo-American Lesotho Services Co. (Pty) Ltd.	–	Lesotho
	Allgro Holdings Ltd.	–	Liberia
	Anglo-Europlan Holdings Ltd.	–	Liberia
	Anmines Ltd.	Mining	Liberia
	Aval Holdings Ltd.	–	Liberia
	Benam Holdings Ltd.	–	Liberia
	Brazam Ltd.	–	Liberia
	Catalina Ltd.	–	Liberia
	Codemin Holdings Ltd.	–	Liberia
	Falcon Investments Ltd.	–	Liberia
	Hime Holdings Ltd.	–	Liberia
	Anglo-Australia S.A.	–	Luxembourg

COMPANY	*SUBSIDIARY*	*TYPE OF INDUSTRY*	*COUNTRY OF INVESTMENT*
Anglo-American Corp. of South Africa Ltd. (cont'd)	Anglo-Rand Holdings S.A.	–	Luxembourg
	Axalux Holdings Ltd	–	Luxembourg
	Lighthouse Investments Ltd.	Investments	Luxembourg
	Orlop Investments Ltd.	Investments	Luxembourg
	Georgic Holdings N.V.	–	Netherlands Antilles
	Rockhold Antilles N.V.	–	Netherlands Antilles
	Anglo-American Services (Nederland) B.V.	Services	Netherlands
	Gallic Holdings B.V.	–	Netherlands
	Rockhold B.V.	–	Netherlands
	Swaziland Iron Ore	Mining	Swaziland
	Development Co. Ltd.		Swaziland
	Swaziland Industries (Pty) Ltd.	–	Swaziland
	Electramic Ltd.	–	U.K.
	Luxam Ltd.	–	U.K.
	Anglo-American Corp. (Central Africa) Ltd.	–	Zambia
	NRI Limited	–	Zimbabwe
	NEIL Chrome Mines Ltd.	Chrome	Zimbabwe
	Rhochrome Ltd.	Chrome	Zimbabwe
Anglo-American Gold Investment Co. Ltd.	Amgold Australia (Pty) Ltd.	–	Australia
	Anglo-American Corp. Argentina Holdings Ltd.*	–	Argentina
	Anglo-American Corp. Brazil Ltd.*	–	Brazil
	Australian Anglo-American Gold (Pty) Ltd.*	–	Australia
	New Zealand Holdings Ltd.	–	New Zealand
Anglo-American Industrial Corp. Ltd.	A.D.D. Investments (Pty) Ltd.	Investments	Australia
	Boart Australia Ltd.	Equipment and services to the mining industry	Australia
	Conlog (Australia) (Pty) Ltd.	–	Australia
	Longyear Australia (Pty) Ltd.	Exploration drilling equipment	Australia
	Civil and Mining Contracting Co. Ltd.	–	Bahamas
	Longyear do Brazil Limitada	Exploration drilling equipment	Brazil
	Boart International Finance Ltd.	Finances	British Virgin Islands
	Boart Canada Incorporated	Hard metals	Canada
	Longyear Canada Inc.	Exploration drilling equipment	Canada
	Longyear Co. Chile Limitada	Exploration drilling equipment	Chile
	Longyear Centroamericana S.A.	Exploration drilling equipment	Costa Rica
	Boart O.Y.	–	Finland
	Longyear France S.A.	Exploration drilling equipment	France
	Boart Harometals (Europe) Ltd.	Hard metals	Ireland
	Conlog Ltd.	–	Israel
	Nippon Longyear Company Ltd.	Exploration drilling equipment	Japan
	Wendt Japan K.K.	–	Japan
	Longhold Ltd.	–	Liberia
	Boart International Luxembourg S.A.H.	–	Luxembourg
	Chrisbros S.A. de C.V.	–	Mexico
	Longyear de Mexico S.A. de C.V.	Exploration drilling equipment	Mexico
	Boart Antilles N.V.	–	Netherlands
	Boart Drilling International B.V.	Drilling equipment	Netherlands
	Longyear Nederland B.V.	Exploration drilling equipment	Netherlands
	Portadrill B.V.	–	Netherlands
	Longyear Papua New Guinea (Pty) Ltd.	Exploration drilling equipment	Netherlands
	Longyear New Zealand Ltd.	Exploration drilling equipment	New Zealand
	Boart A.S.	Equipment and services to the mining industry	Norway

* Anglo-American owns 20 %.

COMPANY	*SUBSIDIARY*	*TYPE OF INDUSTRY*	*COUNTRY OF INVESTMENT*
Anglo-American Industrial Corp. Ltd. (cont'd)	Longyear Philippines Inc.	Equipment and services to the mining industry	Phillippines
	Boart Drilling and Contracting (Portugal) Limitada	–	Portugal
	Diamantes Industriales Roder S.A.	Industrial diamonds	Spain
	Longyear Iberia S.A.	Exploration drilling equipment	Spain
	Boart (Sweden) A.B.	–	Sweden
	Wendt Slipteknik A.B.	Grinding technique	Sweden
	Conlog A.G. Ltd.	–	Switzerland
	Bell Mining Equipment (U.K.) Ltd.	Mining equipment	U.K.
	Binvest Ltd.	–	U.K.
	Boart Investments (U.K.) Ltd.	Investments	U.K.
	Boart (U.K.) Holdings Ltd.	–	U.K.
	Conlog (U.K.) Ltd.	–	U.K.
	Dongray Industrial Ltd.	–	U.K.
	Longyear (U.K.) Ltd.	Exploration drilling equipment	U.K.
	Boart Hardmetals Inc.	Hard metals	U.S.A.
	Conlog Incorporated	–	U.S.A.
	Longyear Americas Inc.	Exploration drilling equipment	U.S.A.
	Longyear Company	–	U.S.A.
	Longyear International Inc.	–	U.S.A.
	Portadrill Inc.	–	U.S.A.
	Wendt Gringing Corp.	Grinding technique	U.S.A.
	B.B.G. Betonbohr-Beteiligungs G.M.B.H.	Concrete drills	West Germany
	Boart G.M.B.H.	–	West Germany
	Boart H.W.F., G.M.B.H. & Co. KG	–	West Germany
	Longyear Deutschland G.M.B.H.	Exploration drilling equipment	West Germany
	Wendt G.M.B.H.	Griding technique	West Germany
	Amalgamated Construction Co. Ltd.	–	Zambia
	Boart Zambia Ltd.	–	Zambia
	The Deep Drilling Co. Ltd.	–	Zambia
	Boart Drilling and Contracting Ltd.	Drilling and contracting	Zimbabwe
	Shepherd's Engineering (PVT) Ltd.	Engineering	Zimbabwe
	Steel Engineering Co. (PVT) Ltd.	Engineering	Zimbabwe
Anglovaal Industries Ltd.	Bitumat Ltd. (Zimbabwe)	Road emulsions	Zimbabwe
Anglovaal Ltd.	Anglo Transvaal Trustees Ltd.	–	U.K.
Argus Printing and Publishing Company Ltd.	Accounting Systems Botswana (Pty) Ltd.	Accounting systems	Botswana
Associated Furniture Companies Ltd.	Duncan Bayne Swaziland (Pty) Ltd.	Furniture	Swaziland
	Sealy (Zimbabwe) (PVT) Ltd.	Furniture	Zimbabwe
Bank Holding Corp. of South Africa Ltd.	SAGIT AG Zurich	Banking	Switzerland
Barlow Rand Ltd.	J. Bibby & Sons (U.K.)	Confectioners	U.K.
T.W. Beckett & Company Ltd.	Rosebeck A.G. (Lichtenstein)	–	Lichtenstein
Berzack Brothers (Holdings) Ltd. (U.K.)*	BIVEC Confirming (U.K.) Ltd.	–	U.K.
	Eastman Machine Co. Ltd.	Machinery	U.K.
	Eastman Machine Manufacturing Co. Ltd. (U.K.)*	Machine manufactory	U.K.
	Bivec Confirming (USA) Inc.	–	U.S.A.

* B.B. holds 50 %.

COMPANY	*SUBSIDIARY*	*TYPE OF INDUSTRY*	*COUNTRY OF INVESTMENT*
Bonuskor Ltd. (Volkskas Group)	SACOEX S.A.	Exports	Spain
Bradlows Stores Ltd.	Bradlow's Stores (Zimbabwe) Ltd.	Chain stores	Zimbabwe
Bromain Holdings Ltd.	Atir Ltd. (Israel)	Electronics	Israel
	Salton Holdings BV	Domestic appliances	Netherlands
	Salton Deutschland GMBH	Domestic appliances	West Germany
Buffalo Corporation Ltd.	Buffalo GMBH	–	West Germany
Cape Wines & Distillers Ltd.	Allan Cameron & Sons (Edinburgh) Ltd.	Dormant	U.K.
	Bergkelder Wine (Toronto) Ltd.	Dormant	Canada
	Castle Wine & Brandy (Zimbabwe) (PVT) Ltd.	Investment	Zimbabwe
	Henry C. Collison & Sons Ltd. (London)	Wholesale	U.K.
	Mountain Cellar Wine (Toronto) Ltd.	Dormant	Canada
	Richelieu et Cie Société Anonyme	Trading	France
	Swaziland Liquor Distributors Ltd.	Wholesale	Swaziland
	Vins et Spiritueux Richelieu S.A. (Zurich)	Investment holding	Switzerland
Charter Consolidated P.L.C.*	Anderson Mavor (USA) Ltd.	Mining	U.S.A.
	Anderson Strathclyde Australia (Pty) Ltd.	Mining	Australia
	Anderson Strathclyde PLC	–	U.K.
	Barnato (Holdings) U.K. Ltd.	–	U.K.
	Beralt Tin & Wolfram (Portugal) SARL	Minerals	Portugal
Clicks Stores Ltd.	Okelemp Corp. Inc (USA)	–	U.S.A.
C.N.A. Gallo Ltd.	Central News Agency (SWA) Ltd.	Retailers	Namibia
	Kincen Holdings Ltd.	Holding company	Bahamas
	Censure Investments Ltd.	Insurance	Bermuda
	Raltons Holdings Ltd.	Dormant	Cayman Islands
Consolidated Gold Fields Ltd. (AAC)	Clwyd Road Surfacing Ltd. (Wales)	Road surfacing	U.K.
	Craig-Yr-Hesg Aggregates Ltd. (Wales)	–	U.K.
	Cornish Road Metal Ltd.	Road metals	U.K.
	Cwmrhydyceirw Quarry Co. Ltd. (Wales)	Quarrying	U.K.
	CGF Iron Holdings (Pty) Ltd.	–	Australia
	New Guinea Goldfields Ltd.	Mining	Australia
	Arc Estates Ltd.	Estates	Barbados
	Devresse & Simon N.V.	–	Belgium
	Tennant International (Belgium) S.A.	–	Belgium
	Zeeminieralen N.V.	Minerals	Belgium
	Gold Fields (Bermuda) Ltd.	–	Bermuda
	Gold Fields Canadian Mining Ltd.	Mining	Canada
	Union Filters Ltd.	Filters	Canada
	Union Tractor Industries (1981) Ltd.	Tractors	Canada
	Gold Field Greeland A/S	–	Denmark
	Spollen Concrete (Dublin) Ltd.	Concrete	Ireland
	Bassett Metalhandel GMBH	Metals	West Germany
	Gold Fields Isurance Ltd.	Insurance	Guernsey
	N.V. Dragrata Lanaken	–	Netherlands

* AAC via her subsidiary «Minorco»

COMPANY	*SUBSIDIARY*	*TYPE OF INDUSTRY*	*COUNTRY OF INVESTMENT*
Consolidated Gold Fields Ltd. (AAC) (cont'd)	Jonker Beton B.V.	Concrete	Netherlands
	B.V. Der Kempen	–	Netherlands
	C. Van Den Heuvel en Zonen's Grint- en Zandhandel B.V.	Gravel and sand	Netherlands
	Van Nieuwpoort Scheepvaart B.V.	Shipping	Netherlands
	Amey Roadstone Asia Ltd.	Roadstones	Hong Kong
	Alumasc (Luxembourg) S.A.	–	Luxembourg
	Ulster Limestone Corp. Ltd.	Limestone	U.K.
	Gold Fields Espanola S.A.	–	Spain
	Gold Fields Holding A.G.	–	Switzerland
	American Tractor Parts Inc.	Tractor spares	U.S.A.
	Associated Sand and Gravel Co. Inc.	Sand and gravel	U.S.A.
	McKinley Iron Co.	Iron	U.S.A.
	Cargus Packaging (Pty) Ltd.	Packaging	U.S.A.
	Consol Glass (Pty) Ltd.	Glas	U.S.A.
Darling & Hodgson Ltd.	D&H Europe BV	–	Netherlands
	Case Co. SA	–	Switzerland
	Pioneer Ready Mixed Concrete (PVT) Ltd.	Ready mixed concrete	Zimbabwe
	Spot Construction Ltd.	Constructors	Jersey
De Beers Consolidated Mines Ltd.	De Beers Industrial Diamonds (Ireland) Ltd.	Industrial diamonds	Ireland
	De Beers Prospecting Botswana (Pty) Ltd.	Prospecting	Botswana
	De Beers Lesotho Mining Company (Pty) Ltd.	Mining	Lesotho
	De Beers European Holding S.A.	–	Luxembourg
	Debid (Pty) Ltd.	–	Australia
	De Beers Diamantas Industrias do Brazil Limitada	Industrial diamonds	Brazil
Enyati Resources Ltd.	Tavares Investments N.V. (Netherlands)	Investments	Netherlands
	A.C. Marijnessen Holding B.V. (Netherlands)	–	Netherlands
	Rebemor S.A. (Switzerland)	–	Switzerland
Federale Volksbeleggings BPK	Firestone Zambia Ltd.	–	Zambia
	Fed Electronic GMBH	Electronic	West Germany
	Farmac N.A. N.V.	–	Belgium
	Farmac Nederland B.V.	–	Netherlands
	Lenfarm AG	–	West Germany
	Swaziland Chemists (Pty) Ltd.	Chemists	Swaziland
	Zimbabwe Drug Houses Ltd.	Drug houses	Zimbabwe
Fedfood Beperk	Botswana Grain & Milling (Pty) Ltd.	Grain and milling	Botswana
	Botswana Bonemeal Factory (Pty) Ltd.	Bonemeal	Botswana
	FF Trading (Jersey) Ltd.	Trading	Jersey
	Simba-Quix Sales (Swaziland) Ltd.	–	Swaziland
	Sideafa Agencies Establishment (Lichtenstein)	–	Lichtenstein
FINTEC Ltd.	Litemaster Industries (PVT) Ltd.	–	Zimbabwe
	Litemaster A.G. Zug	–	Switzerland
	Litemaster Industries Ltd.	–	U.K.
Fraser Alexander Ltd.	Boskop Graniet International BV (Holland)	Granite	Netherlands
	Boskop NV (Antilles)	–	Antilles
	Granite & Quartzite Centre Inc. (USA)	–	U.S.A.

COMPANY	*SUBSIDIARY*	*TYPE OF INDUSTRY*	*COUNTRY OF INVESTMENT*
Fraser Alexander Ltd. (cont'd)	Dorking Agencies Ltd. (Hong Kong)	Granite	Hong Kong
	Mannheimer Granit Handel GMBH	Granite	West Germany
	Quick Chartering (1980) Ltd. (Bermuda)	–	Bermuda
Fraser Ltd.	Alexander Fraser & Son Ltd. (U.K.)	Financing	U.K.
	Fraser Ross Finance Ltd. (U.K.)	Financing	U.K.
	Fraser Air (Lesotho) (Pty) Ltd.	Air Charter	Lesotho
	Frasers (Botswana) (Pty) Ltd.	–	Botswana
	Frasers (Swaziland) Ltd.	–	Swaziland
Genbel Investments Ltd.	Greenwell GIC Securities Ltd. (U.K.)	Securities	U.K.
General Erection Holdings Ltd.	Genric Electrical (Botswana) (Pty) Ltd.	Electricity	Botswana
General Mining Union Corp. Ltd.	Union Corporation (Luxembourg) S.A.	–	Luxembourg
	Union Corporation (Australia) (Pty) Ltd.	–	Australia
	General Australian Explorations (Pty) Ltd.	Explorations	Australia
	Gencor (Australia) Ltd.	Mining interests	Australia
	Union Holdings Ltd. (London)	–	U.K.
	Gencor (U.K.) Ltd.	Mining interests	U.K.
	Hume Pipe Co. Ltd.	Pipes	Zimbabwe
General Tire & Rubber Company (S.A.) Ltd.	Beroscar Ltd.	Dormant	U.K.
	Polyrub S.A.	Dormant	Switzerland
	Pigott Maskew Ltd.	Industrial rubber products	Zambia
	The General Tyre and Rubber Co. Ltd.	Distributors	Zambia
	General Beltings (PVT) Ltd.	Beltings	Zimbabwe
	Pigott Maskew (PVT) Ltd.	Industrial rubber products	Zimbabwe
	The General Tyre & Rubber Co. Swaziland (Pty) Ltd.	Dormant	Swaziland
Goldfields of S.A.	Gold Fields do Brasil Participacoes LDA (Brazil)	–	Brazil
	Terraservice-Projetos Geologicos LDA (Brazil)	Geological projects	Brazil
	Gold-Fields Botswana (Pty) Ltd. (Botswana)	Mining	Botswana
Grinaker Holdings Ltd.	Grinaker Precast (Swaziland) (Pty) Ltd.	Precast concrete	Swaziland
	S. Hilton-Barber (Swaziland) (Pty) Ltd.	Construction	Swaziland
	Grinaker Construction (Botswana) (Pty) Ltd.	Construction	Botswana
	O. Grinaker (Blantyre) (Pty) Ltd.	Dormant	Malawi
The Griqualand Exploration & Finance Co. Ltd.	Central Asbestos (Botswana) (Pty) Ltd.	Dormant	Botswana
	Asbestos Refining Co. (Zimbabwe) (Pty) Ltd.	Dormant	Zimbabwe
	Central Asbestos Co. Ltd.	Selling organisation	U.K.
	Central Tradimex Ltd.	Trade in minerals	U.K.
	Cenbes S.A.	Selling organisation	Switzerland
Gubb and Inggs	Stucken & Whittingham (Lesotho) Ltd.	Wool	Lesotho
	Texas International Mohair Inc.	Mohair	U.S.A.
Haggie Ltd.	African Wire Ropes Ltd. (Zambia)	Wire ropes	Zambia

COMPANY	*SUBSIDIARY*	*TYPE OF INDUSTRY*	*COUNTRY OF INVESTMENT*
Haggie Ltd. (cont'd)	Copperbelt Rope Splicers Ltd. (Zambia)	Rope splicers	Zambia
	Haggie Gourock (PVT) Ltd. (Zimbabwe)	–	Zimbabwe
	Haggie Wire & Rope Ltd. (Zimbabwe)	Wire rope	Zimbabwe
	Samuel Osborn (PVT) Ltd. (Zimbabwe)	–	Zimbabwe
	Rascon Holdings (PVT) Ltd. (Zimbabwe)	–	Zimbabwe
	Wire Industries (Botswana) (Pty) Ltd.	Wire manufactor	Botswana
	Jupiter Holdings Ltd. (Jersey)	–	Jersey
	Neaspring Industries BV (Netherlands)	–	Netherlands
Hendlers Ltd.	Hendler & Hendler Swaziland (Pty) Ltd.	–	Swaziland
	Hendlers (U.K.) Ltd.	–	U.K.
Irvin and Johnson Ltd.	Irvin & Johnson (Australia) (Pty)	Frozen foods	Australia
	Irvin & Johnson (Great Britain) Ltd.	Frozen foods	U.K.
	Irvin & Johnson (Swaziland) Ltd.	Frozen foods	Swaziland
	Marshall Farm (PVT) Ltd.	–	Zimbabwe
Johannesburg Consolidated Investment Company (JCI) Ltd.	African Fencing & Wire Industries (PVT) Ltd.	Fencing and wire industry	Zimbabwe
	E.C. Lenning (PVT) Ltd.	–	Zimbabwe
	Prospects of Zimbabwe (PVT) Ltd.	Mining and prospecting	Zimbabwe
	P.O.Z. Nominees (PVT) Ltd.	Mining and prospecting	Zimbabwe
	Zimbabwe Mining Investments Ltd.	Mining and prospecting	Zimbabwe
	Barnato Brothers Ltd.	Finance	U.K.
John Orr Holdings Ltd.	John Orr (Zimbabwe) (Pty) Ltd.	Chain stores	Zimbabwe
Kaap-Kunene Beleggings BPK	Consortium Enterprises Ltd.	–	Bermuda
	Sociedad Pesquera Atlantic Pacific Ltd.	Fisheries	Chile
Kirsch Trading Group Ltd.	African Interests Ltd. (Lichtenstein)	–	Lichtenstein
	Berger & Co. Ltd. (U.K.)	–	U.K.
	D.Q. Hendriques & Co. (Pty) Ltd.	–	U.K.
	Kalakreich Ltd. (U.K.)	–	U.K.
	Russell Furnishers (Pty) Ltd.	Furnishers	Swaziland
	Wanda Furnishers (Pty) Ltd.	Furnishers	Swaziland
L.T.A. Ltd.	James Thompson Ltd.	Builders	Zimbabwe
	Spencer (Melksham) (PVT) Ltd.	–	Zimbabwe
	J.C. Groenewald Construction (Botswana) (Pty) Ltd.	Construction	Botswana
	LTA Construction (Botswana) (Pty) Ltd.	Construction	Botswana
	LTA Construction (Swaziland) Ltd.	Construction	Swaziland
	Swaziland Concrete Contractors Ltd.	Concrete contractors	Swaziland
	Moolman Brothers Construction Co. (Pty) Ltd.	Construction	Lesotho
Lucern Holdings Ltd.	C&P Holdings NV (Netherlands Antilles)	–	Antilles
	C&P Plastics Inc. (USA)	Plastic	U.S.A.
Malbak Ltd.	Bakke International S.A.	–	Luxembourg

COMPANY	*SUBSIDIARY*	*TYPE OF INDUSTRY*	*COUNTRY OF INVESTMENT*
Merhold Ltd.	Merchant International Holdings Inc. (Panama)	–	Panama
Messina Ltd.	M.T.D. Copper (Sales) Ltd.	Sales office	U.K.
Miscor Holdings Ltd.	Gateway International BV (Holland)	–	Netherlands
	Metlease Inc. (USA)	–	U.S.A.
	Wilmic (Canada) Inc.	–	Canada
	Wilmic International S.A.	–	Lichtenstein
	Gateway International Corp.	–	U.S.A.
	Metrek Corp.	–	U.S.A.
	Trekamerica Corp.	–	U.S.A.
	Trekamerica Limited	–	U.K.
	Mogate Holdings Limited	–	U.K.
	Gateway Management Services S.A.	Management services	Switzerland
Middle Witwatersrand (Western Areas) Ltd.	Harmony Lands & Minerals Ltd.	–	U.K.
Minerals & Resources Corp. Ltd. (Minorco) Luxemburg	Minorco Canada Ltd.	Mining	Canada
	Zamanglo Ltd. (Zambia)	Mining	Zambia
	Inspiration Copper (USA)	Mining	U.S.A.
	Terra Chemicals (USA)	Chemical	U.S.A.
	Inspiration Coal Inc.	Coal	U.S.A.
	Trend Oil Bermuda	Oil	Bermudea
Murray & Roberts Holdings Ltd.	Helicopteros Marino S.A. (Argentine) (Pty) Ltd.	Marine helicopters	Argentina
	Robair Switzerland (Pty) Ltd.	–	Switzerland
	Breitacker A.G. (Switzerland) (Pty) Ltd.	–	Switzerland
	Bitumen Products Manufacturing Co. Ltd. (Zambia)	Bitumen Products	Zambia
	Petrocental Ltd. (U.K.)	–	U.K.
	Causeway Shipping U.K. Ltd.	Shipping	U.K.
	Diving Services of Africa (Zambia) (Pty) Ltd.	Diving services	Zambia
	Bavaria Wadekor (Pty) Ltd.	Building contractors	West Germany
	Gillis Mason Construction Co. (Swaziland) (Pty) Ltd.	Construction	Swaziland
	Roberts-Union Corp. In. (USA) (Pty) Ltd.	–	U.S.A.
	Robcor International Corp. (USA) (Pty) Ltd.	–	U.S.A.
	Huddy Diamond Crown Setting Co. (Zimbabwe) (Pty) Ltd.	–	Zimbabwe
	Unidrilling Zimbabwe (Pty) Ltd.	–	Zimbabwe
Nasionale Pers BPK	Via Afrika (Botswana) (Pty) Ltd.	–	Botswana
Natal Bolts Ltd.	Dysaft Limited (U.K.)	–	U.K.
The Nedbank Group Ltd.	Lancelot S.A.	–	Luxembourg
	Nedeurope S.A.	–	Luxembourg
	N.B.S.A. Nominees Ltd.	–	U.K.
	Prime Securities S.A. (Luxembourg)	Securities	Luxembourg
	Ned Finance A.G. (Switzerland)	Finance	SWITZERLAND
	Ned Finance Asia Ltd. (Hong Kong)	Finance	Hong Kong
Oceana Fishing Group Ltd.	Tafelberg Fisheries (Australia) (Pty) Ltd.	Dormant	Australia

COMPANY	*SUBSIDIARY*	*TYPE OF INDUSTRY*	*COUNTRY OF INVESTMENT*
O.K. Bazaars (1929) Ltd.	OK Bazaars (Botswana) (1976) (Pty) Ltd.	Chain stores	Botswana
	OK Bazaars (Lesotho) (Pty) Ltd.	Chain stores	Lesotho
	OK Bazaars (Mbabane) (Pty) Ltd.	Chain stores	Swaziland
	OK Bazaars (Israel) Ltd.	Chain stores	Israel
	Worinag A.G. Switzerland	Chain stores	Switzerland
ORR-CO Retail Ltd.	John Orr & Co. (Zimbabwe) (PVT) Ltd.	Chain stores	Zimbabwe
Ovenstone Investments Ltd.	Kelvin Contracting (Pty) Ltd.	Building and construction	Lesotho
Pepkor Limited	Vans Stores (Pty) Ltd.	Clothes retailers	Swaziland
	PEP Stores (Pty) Ltd.	Clothes retailers	Lesotho
	Half Price Stores (Pty) Ltd.	Clothes retailers	Botswana
Plascon-Evans Paints Ltd.	Parthenon Paints (Lesotho) (Pty) Ltd.	Paints	Lesotho
	Plascon-Evans Paints (Swaziland) (Pty) Ltd.	Paints	Swaziland
Power Technologies Ltd.	Consolidated Lighting (PVT) Ltd. (Zimbabwe)	Lighting	Zimbabwe
Reunert Ltd.	Sucaro Investments (Jersey) (Pty) Ltd.	Investments	Jersey
	Telettra Swaziland (Pty) Ltd.	–	Swaziland
Rentmeester Beleggings	Luxavia (Pty) Ltd.	Air liners	Benelux
Rustenburg Platnium Holdings Ltd.	Matthey Rustenburg Refiners (U.K.) Ltd.	Mining	U.K.
Saficon Investment Ltd.	Lectrolite Products (Ireland)	Lectrolite products	Ireland
	Lectrolite Products (Swaziland) Ltd.	Lectrolite products	Swaziland
S.A. Manganese Amcor Ltd. (Samancor Ltd.)	Auvernier Ltd. (U.K.)	Mining	U.K.
	Samancor Overseas Ltd. (U.K.)	–	U.K.
	Samancor Botswana (Pty) Ltd.	–	Botswana
	Sanmancor Metals & Minerals Ltd. (Virgin Islands)	Metals and minerals	Virgin Islands
	Metmarks A.G. (Switzerland)	–	Switzerland
	Anglo American de Portugal Holding Ltd. (Portugal)	–	Portugal
	Euromina SARL (Lisbon)	–	Portugal
SAPPI Ltd.	Sappi (Zimbabwe)	Manufacturing and marketing	Zimbabwe
	Bondtite (Australia) (Pty) Ltd.	–	Australia
	Boxes and Shooks (Swaziland) (Pty) Ltd.	–	Swaziland
Seardel Investment Corp. Ltd.	Harven Manufacturing Co. (PVT) Ltd.	Manufacturing	Zimbabwe
S.A. BIAS HOLDINGS LTD.	Merchant Shippers (U.K.) Ltd.	Shipping	U.K.
Sun Hotels International Ltd.	Swazispa Holdings Ltd.	–	Botswana
	Sun International (Botswana) (Pty) Ltd.	Hotel	Botswana
	Sun International of Lesotho (Pty) Ltd.	Hotel	Lesotho
	Sun Hotels International (Bermuda) Ltd.	Hotel	Bermuda
	Casino de Maurice Ltd.	Casino	Mauritius
Television and Electrical Holdings Ltd.	Tedelex London (Pty) Ltd.	Computers/electronics	U.K.
	Tedelex (Zambia) Ltd.	Computers/electronics	Zambia
	Systema (U.K.) Ltd.	Electronics	U.K.
	Tedelex (Israel) Ltd.	Computers/electronics	Israel

COMPANY	*SUBSIDIARY*	*TYPE OF INDUSTRY*	*COUNTRY OF INVESTMENT*
Tiger Oats and National Milling Co. Ltd.	Combined Shipping and Trading Co. Ltd. (U.K.)	Shipping and trading	U.K.
	Imex Mercantile (U.K.) Ltd.	Imports/exports	U.K.
	Comshipco (London) Ltd.	Shipping	U.K.
	C.S. & T. Ltd. (U.K.)	–	U.K.
	Exeter Sales (London) Ltd.	–	U.K.
	Schwarz Services Ltd. (U.K.)	–	U.K.
	Comshipco Shiffarts GMBH (Germany)	Shipping	West Germany
	Crown Oil Mills (Hong Kong) Ltd.	Oil mills	Hong Kong
	Crown Oil Mills (Zimbabwe) (PVT) Ltd.	Oil mills	Zimbabwe
	Tiger Oats and National Milling Co. (Zimbabwe) (PVT) Ltd.	Millers	Zimbabwe
	Edible Products (Africa) (Pty) Ltd. (Botswana)	Edible products	Botswana
	Tati Agric. Ltd. (Botswana)	–	Botswana
	Gazellant N.V. (Netherlands)	–	Netherlands
	Serat N.V. (Netherlands)	–	Netherlands
	Donge Exploitatiemaatschappij (Netherlands)	–	Netherlands
	Weesperkarspel B.V. (Netherlands)	–	Netherlands
	Maluti Distributors (Pty) Ltd. (Lesotho)	Distributors	Lesotho
	Lesotho Milling Co. (Pty) Ltd.	Millers	Lesotho
	N.F.H. Investments (Jersey) Ltd.	Investments	Jersey
	Pacific Imex (New Zealand) Ltd.	Imports/exports	New Zealand
	Comshipco (USA) Ltd.	Shipping	New Zealand
	Macvic Trading Ltd. (Canada)	–	Canada
Trade and Industry Acceptance Corp. Ltd.	Trade and Industry Acceptance Corp. (Australia) (Pty) Ltd.	–	Australia
	Trade and Industry Acceptance Corp. (Belgium) S.A.	–	Belgium
	Trade and Industry Corp. (Bermuda) Ltd.	–	Bermuda
	Commercial & Industrial Credit Insurance Corp. Ltd.	–	Bermuda
	Trade & Industry Acceptance Corp. (Far East) Pty Ltd.	–	Hong Kong
	Hawkesley Ltd.	–	Hong Kong
	T.I.A.C. (Asia) Ltd.	–	Hong Kong
	Trade & Industry Acceptance Corp. (Israel) Ltd.	–	Israel
	Anglo African Shipping Co. of Israel Ltd.	–	Israel
	Fedship (Netherlands Antilles) N.V.	–	Netherlands Antilles
	Selhurst Corporation N.V.	–	Netherlands Antilles
	Fedship B.V.	–	Netherlands
	M.D.C. Shipping (Netherlands) B.V.	Shipping	Netherlands
	Farley Corporation	–	Panama
	Anglo Overseas	–	Panama
	Trade & Industry Acceptance Corp. (Far East) Pty Ltd.	–	Singapore
	Iverford (Pty) Ltd.	–	Singapore
	Commonwealth Shippers (Swaziland) (Pty) Ltd.	Shipping	Swaziland
	T.I.A.C. AG	–	Switzerland

COMPANY	*SUBSIDIARY*	*TYPE OF INDUSTRY*	*COUNTRY OF INVESTMENT*
Trade and Industry Acceptance Corp. Ltd. (cont'd)	Trade and Industry Acceptance (London) Ltd. Corporation	–	U.K.
	Affiliated Exporters (London) Ltd.	Exporters	U.K.
	Commonwealth International Shippers (U.K.) Ltd.	Shippers	U.K.
	Landau & Coetsee Ltd.	–	U.K.
	Trade and Industry Acceptance Corp. (South East Asia) Ltd.	–	U.K.
	Anglo African Shipping Co. (U.K.) Ltd.	Shipping	U.K.
	Anglo Commercial Finance Co. Ltd.	Commercial finance	U.K.
	Beechbray Ltd.	–	U.K.
	Knightbest Ltd.	–	U.K.
	Manufacturers Development Co. Ltd.	–	U.K.
	Trade and Industry Corp. (USA) Inc.	–	U.S.A.
	Commonwealth Shippers (USA) Inc.	Shippers	U.S.A.
	Empire State Buying Corp.	–	U.S.A.
	Anglo African Shipping Co. of New York Inc.	Shippers	U.S.A.
	Anglo Commercial Corporation	–	U.S.A.
The Union Steel Corporation of SA, Ltd.	Veldmaster Incorporated	–	U.S.A.
The Unisec Group Ltd.	L. Suzman (U.K.) Ltd.	Tobacco	U.K.
Veka Ltd.	M. Bertish & Co.	–	U.K.
W & A Investment Corporation Ltd.	Elfstern N.V.	–	Belgium
	Amethyst Services (Jersey) Ltd.	–	Jersey
	Mei Mei N.V.	–	Netherlands Antilles
	Cymot Namibia (Pty) Ltd.	–	Namibia
	Beleggingsmaatschappij Almere B.V.	Investments	Netherlands
	Valreal A.G.	–	Switzerland
	Bowman Securities Ltd. (U.K.)	Securities	U.K.
	Poole Securities Ltd. (U.K.)	Securities	U.K.
	Dewhurst Dent PLC (U.K.)	–	U.K.
	Keted Investment S.A. (U.K.)	Investments	U.K.
Williams Hunt S.A. Ltd.	Motor & General Supplies (Botswana) (Pty) Ltd.	Motor and general supplies	Botswana
	E.W. Tarry P.L.C.	Motors	U.K.
	Williams Hunt Motors & Tools (U.K.) Ltd.	Motors and tools	U.K.
	Burgasvet Securities Ltd.	Securities	U.K.
	Mukwa Properties (PVT) Ltd.	Properties	Zimbabwe

Source: Apartheid for Export? South African Transnational Corporations Abroad, ICFTU, Brussels, June 1989.
